



INTERNATIONAL LABOUR OFFICE GENEVA

# **EQUALITY IN EMPLOYMENT AND OCCUPATION**

General Survey by the Committee of Experts on the Application  
of Conventions and Recommendations

INTERNATIONAL LABOUR CONFERENCE

75th SESSION 1988





International Labour Conference  
75th Session 1988

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Report III  
(Part 4 B)

Third item on the agenda:  
Information and reports on the application  
of Conventions and Recommendations

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General Survey of the Reports  
on the Discrimination (Employment  
and Occupation) Convention (No. 111)  
and Recommendation (No. 111), 1958

Report of the Committee of Experts on the Application of Conventions and  
Recommendations (Articles 19, 22 and 35 of the Constitution)

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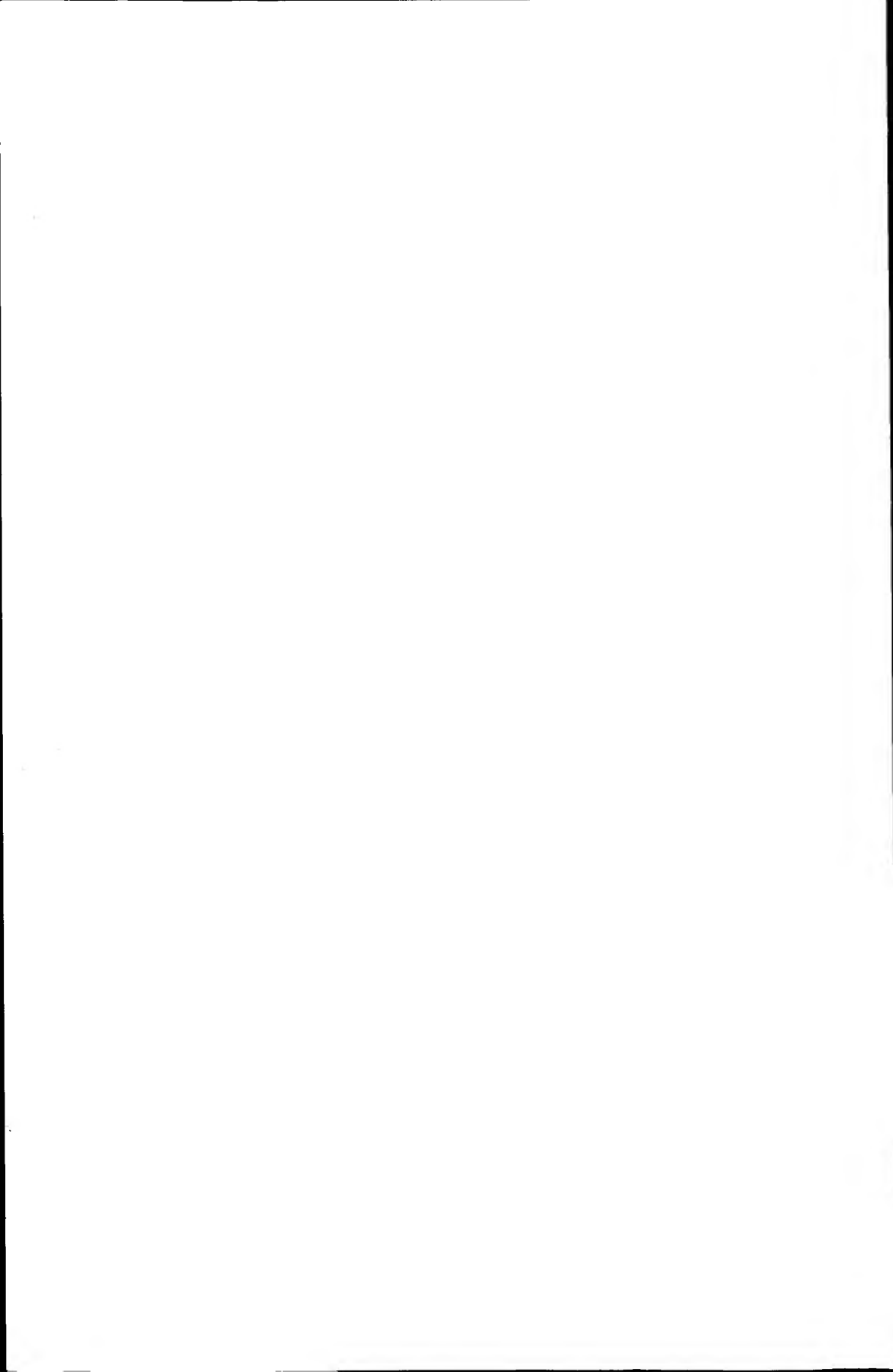
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GENERAL SURVEY: EQUALITY IN  
EMPLOYMENT AND OCCUPATION

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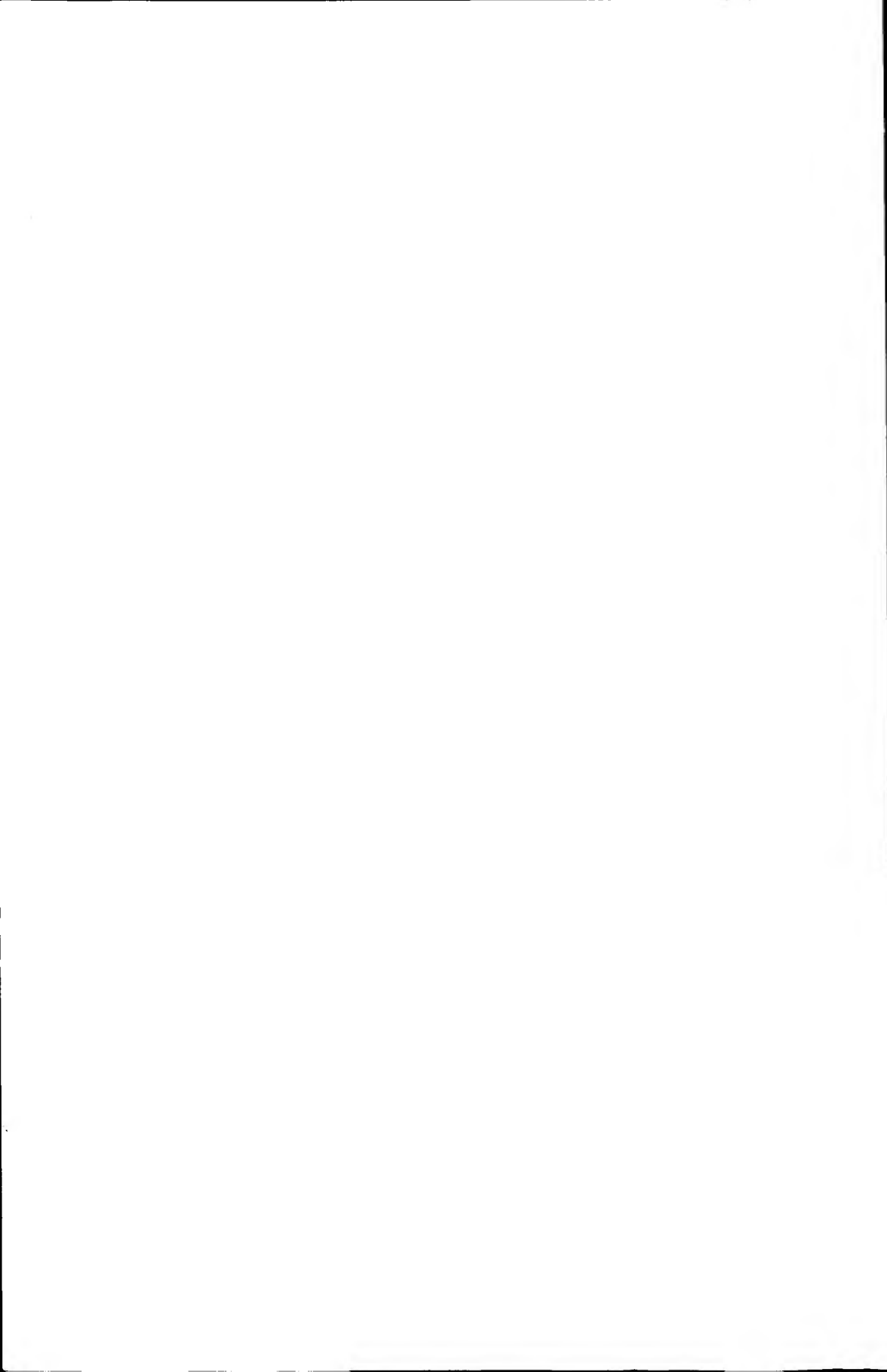
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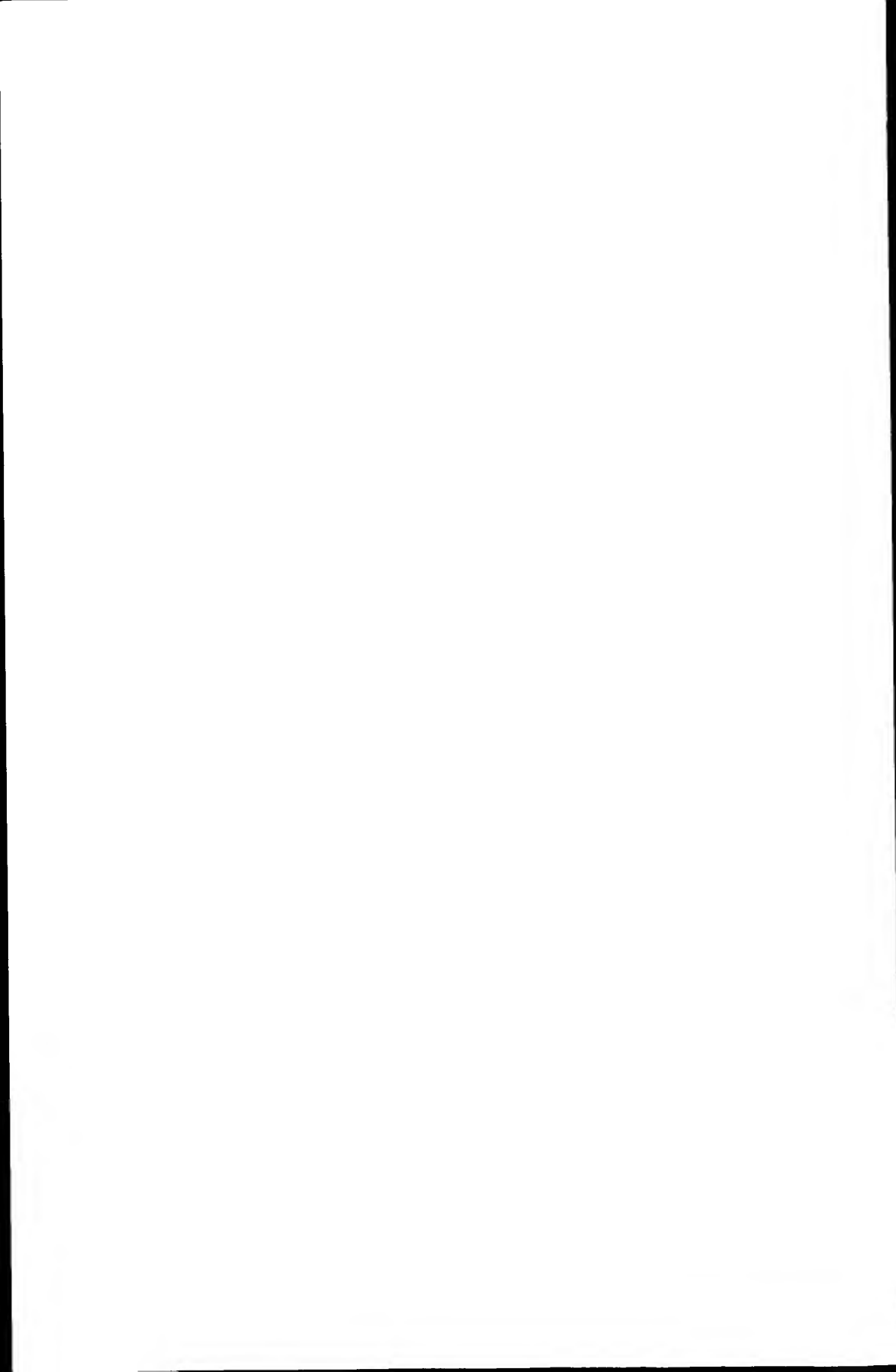
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## INTRODUCTION

1. In accordance with article 19 of the Constitution, the Governing Body of the ILO, at its 231st Session (November 1985) requested governments to report on the position of their law and practice respecting the promotion of equality of opportunity and treatment in employment and occupation, as laid down in the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958.<sup>1</sup> This decision marks the 30th anniversary of the adoption of these instruments and coincides with the 40th anniversary of the Universal Declaration of Human Rights<sup>2</sup> to which explicit reference is made in the Preamble to the Convention. Furthermore, the Governing Body of the ILO decided at its 208th (November 1978) and 209th (March 1979) Sessions that countries that had not ratified Convention No. 111 should be specially invited to provide reports on this Convention under article 19 of the Constitution every four years.<sup>3</sup> The first of these reports were examined in 1980 and the third examination was due in 1988. The reports thus supplied by the governments, together with those submitted in accordance with articles 22 and 35 of the ILO Constitution, by States which have ratified the Convention, have enabled the Committee of Experts on the Application of Conventions and Recommendations to carry out, in accordance with its usual practice, the third general survey of the situation as regards the implementation of these instruments, both in ratifying States and in countries which have not ratified the Convention.<sup>4</sup>

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<sup>1</sup> ILO, Official Bulletin, Vol. LXIX, 1986, Series A, No. 1, pp. 9-10.

<sup>2</sup> Adopted and proclaimed by the General Assembly of the United Nations in resolution 217A(III) of 10 December 1948.

<sup>3</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4(A)), International Labour Conference, 66th Session, Geneva 1980, General Report, paras. 32-38. These reports will henceforth be referred to as follows: "RCE (followed by the year)".

<sup>4</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IV), International Labour Conference, 47th Session, Geneva, 1963, and Report III (Part 4(B)), 56th Session, Geneva, 1971. These reports will henceforth be referred to as follows: "General Survey (followed by the year (1963 or 1971))".

Background to the survey

2. From the very first, the question of the observance of equality of opportunity and treatment has been one of the fundamental objectives of the International Labour Organisation. The Constitution of the ILO, as rendered in 1919, indicated that this principle is among those that are "of special and urgent importance" that should guide the policy of the International Labour Organisation, and set out in point 8 that "the standards set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein".<sup>5</sup> In a resolution adopted in 1938, the International Labour Conference invited all Members of the Organisation "to apply the principle of equality of treatment to all workers resident in their territory, and to renounce all measures of exception which might in particular establish discrimination against workers belonging to certain races or confessions with regard to their admission to public or private posts."<sup>6</sup> The Declaration of Philadelphia concerning the Aims and Purposes of the International Labour Organisation stated that the attainment of conditions making it possible to achieve equality of opportunity and treatment was one of the central aims of national and international policy, and added that "all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective".<sup>7</sup> In the field of equality between men and women, the adoption of the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1950 constituted an important step forward in the achievement of this objective.<sup>8</sup> In 1954, the Economic and Social Council of the United Nations, following a resolution adopted by the Human Rights Commission, entrusted the International Labour Organisation with the task of undertaking a study of discrimination in the field of employment and occupation. This report on law and practice enabled the Governing Body of the ILO to consider the inclusion of the question on the agenda of the 40th Session of the International Labour Conference.<sup>9</sup> The 1958

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<sup>5</sup> Section II, article 41 of the Constitution (Article 427 of the Treaty of the Versailles). Point 7 deals with equal remuneration; "men and women should receive equal remuneration for work of equal value".

<sup>6</sup> International Labour Conference (ILC), Record of Proceedings, 24th Session, Geneva, 1938, p. 679.

<sup>7</sup> Part II of the Declaration of Philadelphia which, according to article 1, para. 1, of the Constitution, sets forth the objects of the ILO.

<sup>8</sup> Paragraph 6(a) and (d) of Recommendation No. 90 provides for a number of measures that were taken up in the 1958 instruments, whose scope is not limited to equality between men and women.

<sup>9</sup> ILO, Official Bulletin, Vol. XXXVIII, 1955, No. 7, p. 327.

Convention and Recommendation are the first instruments adopted by the International Labour Conference with the specific subject of discrimination in respect of employment and occupation, with a completely general scope.<sup>10</sup> No employment and no occupation in the widest sense of the term are excluded from the scope of the 1958 instruments, which apply to all workers. They cover not only access to training, to employment and to particular occupations but also the whole range of conditions of employment. These instruments are thus directed towards the application, in all fields relating to labour, of the general principles of equality, dignity and freedom proclaimed in the Universal Declaration of Human Rights<sup>11</sup> which have received various forms of expression within the International Labour Organisation and at the international level.

### ILO action regarding equality

3. In general, the scope as regards individuals of the Conventions and Recommendations adopted by the International Labour Conference is general and does not countenance forms of discrimination within the meaning of the 1958 instruments. Furthermore, the Conference has adopted Conventions and Recommendations dealing with specific subjects which contain provisions expressly prohibiting, or seeking to eliminate, the application of discriminatory measures. Thus the Equality of Treatment (Social Security) Convention, 1962 (No. 118) particularly addresses the equality of treatment between nationals and non-nationals in the field it covers. Since the previous General Survey, the following instruments have been adopted: the Minimum Age Recommendation, 1973 (No. 146);<sup>12</sup> the Paid Educational Leave Convention (No. 140) and Recommendation (No. 148), 1974;<sup>13</sup> the Rural Workers' Organisations Convention (No. 141) and

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<sup>10</sup> The substantive provisions of the Convention and Recommendation are set out in Appendix I.

<sup>11</sup> See below, Chapter 1, Section 3, para. 31.

<sup>12</sup> Paragraph 2(c): programmes and measures adopted under the national policy designed to ensure the effective abolition of child labour shall give special attention to factors such as, "the development and progressive extension, without any discrimination, of social security and family welfare measures aimed at ensuring child maintenance, including children's allowances".

<sup>13</sup> Article 8 of the Convention: "Paid educational leave shall not be denied to workers on the ground of race, colour, sex, religion, political opinion, national extraction or social origin." See also Article 9 on the special provisions to be established in order to facilitate access to educational leave for certain categories of workers. Identical measures are included in Paragraphs 13 and 15 of the Recommendation.

Recommendation (No. 149), 1975;<sup>14</sup> the Human Resources Development Convention (No. 142) and Recommendation (No. 150), 1975;<sup>15</sup> the Migrant Workers (Supplementary Provisions) Convention (No. 143) and Recommendation (No. 151), 1975;<sup>16</sup> the Labour Relations (Public Service) Convention, 1978 (No. 151);<sup>17</sup> the Older Workers Recommendation, 1980 (No. 162);<sup>18</sup> the Workers with Family Responsibilities Convention, 1981 (No. 156);<sup>19</sup> the Termination of Employment Convention (No. 158) and Recommendation (No. 166),

<sup>14</sup> Article 4 of the Convention: "It shall be an objective of national policy concerning rural development to facilitate the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring the participation of rural workers, without discrimination as defined in the Discrimination (Employment and Occupation) Convention, 1958, in economic and social development and in the benefits resulting therefrom." Article 5 requires that a State ratifying the Convention shall adopt and carry out a policy of active encouragement of these organisations, particularly with a view to eliminating such "legislative and administrative discrimination" against rural workers' organisations and their members as may exist. See also Paragraph 4 of Recommendation No. 149.

<sup>15</sup> Article 1, para. 5 of the Convention: "The policies and programmes [of vocational guidance and vocational training] shall encourage and enable all persons, on an equal basis and without discrimination whatsoever, to develop and use their capabilities for work [...]". This provision also appears in Paragraph 4(4) of the Recommendation; its Paragraph 5(2) stipulates that member States should aim at ensuring equal access to vocational guidance and vocational training.

<sup>16</sup> The International Labour Conference indicated in the introductory paragraphs of the Convention that the proposals concerning migrant workers would take the form of a Convention "supplementing the Migration for Employment Convention (Revised), 1949 and the Discrimination (Employment and Occupation) Convention, 1958". Part II of the Convention is entitled "Equality of Opportunity and Treatment" and lays down in Article 10 that a national policy shall be declared and pursued in order "to promote and guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within [the Member's] territory." See also Part I of Recommendation No. 151.

<sup>17</sup> Article 4, paragraph 1.

<sup>18</sup> Part II of the Recommendation, Paragraphs 3 to 10: these provisions set out the measures that should be taken within the framework of a national policy to promote equality of opportunity and treatment in order to prevent discrimination in employment and occupation with regard to older workers.

<sup>19</sup> See below, Chapter 1, Section 3, Subsection 2, para. 68.

1982;<sup>20</sup> the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159);<sup>21</sup> and the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169).<sup>22</sup>

4. In the more limited field of equality of opportunity and treatment between women and men in employment and occupation, the International Labour Conference adopted, at its 60th Session, a Declaration on Equality of Opportunity and Treatment for Women Workers<sup>23</sup> the importance of which was recalled by the Resolution on equal opportunities and equal treatment for men and women in employment.<sup>24</sup> An ILO Plan of Action on Equality of Opportunity and Treatment of Men and Women in Employment<sup>25</sup> was adopted by the Governing Body in 1987 to give effect to the above resolution.

5. The ILO has developed other forms of action in order to promote the achievement in all countries of equality of opportunity and treatment and the elimination of discrimination in the field of labour, through an improved knowledge of the problems involved in discrimination and the appropriate means for resolving them. In addition to the compilation and dissemination of information on developments in certain countries and the preparation of specialised publications (guides of good practice intended for government departments, 'employers' and workers' organisations), many meetings were organised in all the regions (expert meetings, symposia, seminars) in order to examine these matters, particularly on a tripartite basis.

6. As part of the functions assigned to the Office under article 10 of the Constitution,<sup>26</sup> certain specific situations were

<sup>20</sup> Article 5 of the Convention enumerates the grounds which do not constitute valid reasons for termination, including race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Paragraph 5(a) of the Recommendation adds to this list "age, subject to national law and practice regarding retirement". See below, Chapter II, Section 3, para. 112.

<sup>21</sup> See Chapter I, Section 3, Subsection 2, para. 69.

<sup>22</sup> Paragraph 7: "The policies, plans and programmes referred to in Paragraphs 3 and 4 of this Recommendation should aim at eliminating any discrimination and ensuring for all workers equal opportunity and treatment in respect of access to employment, conditions of employment, wages and income, vocational guidance and training and career development."

<sup>23</sup> ILC, 60th Session, 1975, Declaration on Equality of Opportunity and Treatment for Women Workers, Official Bulletin, Vol. LVIII, 1975, Series A, pp. 96-100.

<sup>24</sup> ILC, 71st Session, 1985, Resolution on equal opportunities and equal treatment for men and women in employment, Official Bulletin, Vol. LXVIII, 1985, Series A, No. 2, pp. 85-95.

<sup>25</sup> GB.235/CD/2/1.

<sup>26</sup> Article 10, para. 1, of the Constitution: "The functions of the International Labour Office shall include [...] the conduct of such special investigations as may be ordered by the Conference or by the Governing Body".

examined together with possible solutions to them from the point of view of equality of opportunity and treatment in the field of labour.

7. Such is the case with ILO action concerning the apartheid policy of the Republic of South Africa.<sup>27</sup> In the first General Survey on the application of Convention No. 111, in 1963, the Committee emphasised the gravity of apartheid policy when it examined the report supplied at that time by the South African Government. The Republic of South Africa ceased to be a Member of the ILO on 11 March 1966 and has not ratified Convention No. 111.<sup>28</sup> In 1964, at its 48th Session, the International Labour Conference adopted a Declaration concerning the policy of apartheid in that country, in which it expressed its condemnation of the policy and instructed, *inter alia*, the Director-General to submit a special report on that subject each year. At the request of the International Labour Conference in 1980, the 1981 special report summarised the measures adopted by the South African Government concerning the recommendations contained in the 1964 ILO Programme for the Elimination of Apartheid in Labour Matters.<sup>29</sup> The conclusions concerned the three major branches of labour matters considered in the programme: equality of opportunity in respect of admission to employment and training; freedom from forced labour; freedom of association and the right to organise. The Report found in particular that separate educational systems still existed for each racial group and remained a key element in the policy of apartheid, that restrictions upon work persisted and that despite progress regarding membership in trade unions, a number of discriminatory aspects of the legislation had been retained. At its 67th Session (1981) the International Labour Conference adopted a Declaration concerning the Policy of Apartheid in South Africa, bringing up to the date the 1964 Declaration. Paragraph 5 of the Declaration confirmed the Director-General's mandate to monitor and follow the situation in South Africa in respect of labour and social matters and to submit a special report on the subject every year for consideration by the Conference Committee on Apartheid.

8. Since 1978, a report by the mission sent by the Director-General to examine the situation of workers of the Occupied Arab Territories has been submitted to the International Labour Conference every year. The mission has been guided in its work "by

<sup>27</sup> For an analysis of the discriminatory nature of the policy of separate development in South Africa, see ILO, Special Report of the Director-General on the Application of the Declaration concerning the Policy of Apartheid of the Republic of South Africa, ILC, 49th Session, Geneva, 1965, pp. 23-24.

<sup>28</sup> The South African Government informed the Director-General of the ILO that the country had decided to withdraw from the Organisation on 11 March 1964. South Africa has never been bound by Convention No. 111. For these reasons, no report from South Africa has been received for this Survey. The same was true for the previous Survey (General Survey, 1971, paras. 7 and 8).

<sup>29</sup> ILO, Seventeenth Special Report of the Director-General on the Application of the Declaration concerning the Policy of Apartheid of the Republic of South Africa, ILC, 67th Session, 1981.

the principles and objectives laid down in the Constitution of the ILO (Declaration of Philadelphia) and in the provisions adopted on the subject by the Conference, with particular reference to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Recommendation (No. 111) which supplements it [...].<sup>30</sup> The representatives of the Director-General pointed out in their most recent report that the recommendations made previously, particularly with regard to the following points, are still relevant: "(3) improvement of working conditions by the full application in practice of the principle of equal treatment for workers from the occupied territories employed in Israel, particularly in view of the impact of the work permit system on job security; [...] (6) elimination of inequality of opportunity and treatment resulting, in the field of employment and development, from the policy relating to Israeli settlements in the occupied territories; (7) elimination of inequality of treatment with respect to social security for workers from Arab territories employed in Israel [...]."<sup>31</sup>

### Activities of the United Nations and other organisations

9. The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, which contain provisions concerning equality (respectively: Article 2, paragraph 3; Article 3, paragraph 7(a)(i); and Article 2, paragraph 1), came into force during the period under consideration.<sup>32</sup> As regards the standard-setting activities of the United Nations, since the previous general survey, the General Assembly has adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>33</sup> and the Convention on the Elimination of All Forms of

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<sup>30</sup> ILO, Action taken on the resolutions adopted by the International Labour Conference at its 59th to 64th Sessions, Supplement to the Report of the Director-General, Appendix, Report of the Mission Sent by the Director-General to Examine the Situation of Workers of the Occupied Arab Territories, ILC, 65th Session, 1979, p. 23.

<sup>31</sup> ILO, Report of the Director-General, Appendices, Report on the Situation of Workers of the Occupied Arab Territories, ILC, 73rd Session, Geneva, 1987, p. 35.

<sup>32</sup> Adopted by the General Assembly on 16 December 1966 (resolution 2200 A (XXI)), they came into force respectively on 3 January 1976 and on 23 March 1976. By resolution 1988 (LX) of 11 May 1976, the United Nations Economic and Social Council called upon the ILO to submit to it reports on the progress made in achieving the observance of the provisions of the Covenant on Economic, Social and Cultural Rights falling within the scope of the Organisation's competence. Nine reports prepared by the Committee of Experts, to whom the Governing Body of the ILO entrusted this task, have been submitted to the Council.

<sup>33</sup> General Assembly resolution 3068 (XXVIII) of 30 November 1973; entry into force, 18 July 1976.

Discrimination Against Women.<sup>34</sup> A Committee on the Elimination of Discrimination Against Women, with the task of considering the progress made in the implementation of the Convention, started work in 1982. Furthermore, two Declarations have been adopted since 1971 in fields relating to the application of the Convention: the Declaration on the Rights of Disabled Persons<sup>35</sup> and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>36</sup> Finally, UNESCO adopted a Declaration on Race and Racial Prejudice.<sup>37</sup> It should be recalled that the Committee of Experts provided for in Part II of the International Convention on the Elimination of All Forms of Racial Discrimination, in order to examine its application on the basis of reports from the States Parties, began its work in January 1970.

10. At the regional level, various instruments have been adopted for the promotion and application of the principle of equality of opportunity and treatment in employment and occupation. The American Convention on Human Rights<sup>38</sup> lays down that the States Parties to the Convention undertake to ensure to all persons subject to their jurisdiction the free and full exercise of their rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (Article 1, paragraph 1). The African Charter on Human and Peoples' Rights, adopted in 1981, guarantees that every individual shall have the right to work without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>39</sup> The European Social Charter of 1961 in Article 1, paragraph 2, provides, *inter alia*, for the elimination of all forms of discrimination in employment<sup>40</sup> and in Article 4, paragraph 3, recognises the right of

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<sup>34</sup> General Assembly resolution 34/180, of 18 December 1979; entry into force, 3 September 1981.

<sup>35</sup> Proclaimed by the General Assembly on 9 December 1975 (resolution 3447 (XXX)), paras. 7, 8 and 10.

<sup>36</sup> Proclaimed by the General Assembly on 25 November 1981 (resolution 36/55).

<sup>37</sup> Adopted on 27 November 1978 by the 20th Session of the General Conference of the United Nations Educational, Scientific and Cultural Organisation in Paris.

<sup>38</sup> Adopted on 22 November 1969 by the Inter-American Specialized Conference on Human Rights. No provision specifically covers equality in employment and occupation, which should, however, be covered by the guarantee provided for in Article 1, paragraph 1, of the Convention.

<sup>39</sup> Articles 2 and 15 of the Charter.

<sup>40</sup> The Committee of Independent Experts considered that "this provision was closely bound up with two particularly important problems, viz. the problem of forced labour and the elimination of all forms of discrimination in employment." Council of Europe, Case Law on the European Social Charter, Strasbourg, 1982, p. 3.



men and women workers to equal pay for work of equal value. Article 48, paragraph 2, of the Treaty establishing the European Economic Community, indicates that the freedom of movement for workers "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". The principle that men and women shall receive equal pay for equal work is included in Article 119 of the Treaty. Since 1975, the European Communities have pursued their activities to promote equality of opportunity and treatment in a series of directives adopted by the Council covering a large number of questions related to equality between men and women.<sup>41</sup> On the basis of its mandate as set out in its Constitution (Article 3, paragraph 3(b)) to examine problems relating to the employment of women, the Arab Labour Organisation has also dealt with the question of equal remuneration for women in two Arab Labour Conventions which refer to equal wages for similar work.<sup>42</sup>

### Ratification of the Convention

11. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), has received 34 ratifications since the last General Survey in 1971; 30 years after its adoption by the Conference, this brings the total number of ratifications to 108, placing the instrument among the most widely ratified Conventions by countries in all regions of the world. The Convention is also applicable without modifications to eight non-metropolitan territories. Ratifications and declarations of application are listed with reports received in Appendix II.<sup>43</sup>

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<sup>41</sup> Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (75/117/EEC); Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (76/207/EEC); Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC); Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (86/378/EEC); Council Directive of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (86/613/EEC).

<sup>42</sup> Convention on Female Workers, 1976 (No. 5), Article 3, and Convention on the Determination and Protection of Wages, 1983 (No. 15), Article 13.

<sup>43</sup> Throughout this General Survey, the names of countries which have ratified the Convention are underlined.

12. From the reports submitted by countries that have not ratified the Convention, it appears that a number of them are prepared to do so. The Government of Uruguay has indicated that the difficulties preventing ratification of the Convention have disappeared with the restoration of democracy and the repeal of provisions contrary to those of the Convention. A draft ratification Act, supported by the tripartite advisory group on international relations, has been submitted to the Senate. The Government of Suriname emphasised the difficulties that could result from the lack of statistics on the situation of women in the rural and urban informal sectors, although the ratification of the Convention raised no major difficulties in view of government policy. The Convention will be submitted in the near future by the Minister of Labour to the Labour Advisory Board with a view to its ratification. The Government of Belize indicated in its report that, although there were no apparent difficulties in the application of the principle, supplementary studies might be necessary before ratification could be envisaged. In Burundi the Government emphasised that, although there were no difficulties in law or practice preventing the ratification of the Convention, the competent authority reserved the right to judge the suitability of formally ratifying the Convention. The Government of the United Arab Emirates stated that the State had established priorities and stages for the ratification procedure in order to be in a position to comply with all the obligations resulting from ratification and to set up a suitable technical body, and for these reasons it had not yet ratified the Convention. The Governments of Cameroon, Nigeria, the Seychelles and Zaire stated that there were no apparent difficulties preventing or delaying ratification of the Convention, without giving further details regarding their intentions in this respect. The Government of Zimbabwe indicated that more time was needed to fully assess the effects of the national legislation before major changes were made to align it with the Convention and/or the Recommendation.

13. A number of governments noted some difficulties regarding the possibility of ratifying the Convention. The Government of China noted that the main obstacle to ratification lay in the need to further improve national legislation. The Government of Ireland stated that the principal difficulty preventing the ratification of the Convention lay in the contents of Article 1, paragraph 1(a), of the Convention which included grounds of discrimination (race, colour, religion, political opinion, national extraction and social origin) which are not the subject of national legislation.<sup>44</sup> The Government of Botswana indicated that the issue of women not being allowed to undertake underground work would be considered by the Government since it may, in spite of the good intentions, be seen as a form of discrimination on the basis of sex.<sup>45</sup> The Government of Japan

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<sup>44</sup> The Irish Congress of Trade Unions is of the opinion that efforts should be undertaken in order to resolve this difficulty and ratify the Convention.

<sup>45</sup> On this point, see below, Chapter III, Section 3, Subsection 1.

stated, in reply to the question concerning the prospects of ratification, that the Convention involved provisions that are closely related with employers' freedom of contracting, and that, in this respect, it was necessary to give consideration to the harmony between domestic law and the Convention.<sup>46</sup> The Government of Luxembourg indicated that its legislation contained discriminatory measures concerning foreign workers with regard to their participation as representatives of employees in the enterprise, and considered that this might constitute an obstacle in the medium term to the ratification of the Convention.<sup>47</sup> The Government of the United Kingdom indicated that it was fully committed to a policy of equal opportunity in the employment field in Great Britain and Northern Ireland; however, it was not intended at present to alter the legislation to give further effect to the provisions of the Convention or the Recommendation, because of difficulties in a number of areas (certain qualifications concerning the manner in which the 1976 Race Relations Act is applied to members of the Armed Forces, restrictions in certain cases on the employment of foreigners in the public service, distinctions in the wages paid to seafarers employed on board vessels flying the flag of the United Kingdom according to whether they are domiciled in the United Kingdom or not). The Government of Sri Lanka noted that an obstacle to ratification was the absence of specific legislation prohibiting discrimination in employment and occupation and the fact that the national legislation fell short of requirements of the Convention in several respects (discrimination in wages paid to women and men in certain sectors, restrictions in the recruitment of women to certain services and posts in the public service, etc.). The Government of Thailand stated its awareness of the fact that certain provisions of the Convention were not yet covered by national law or practice, although it was the duty of the Department of Labour to promote and encourage non-discrimination in employment, occupation and training. The Government of Malaysia indicated that it had no immediate plan to ratify the Convention but would continue to review its labour law and practice as far as possible to be in line with the provisions of the Convention and Recommendation.

#### Available information and arrangement of the survey

14. The reports on the Convention submitted by ratifying and non-ratifying countries, and the reports on the Recommendation, have made it possible to gather information concerning 139 States and 17 non-metropolitan territories. A table showing the reports received is given in Appendix II. The reports from certain countries supplied detailed information on internal measures involving various forms of action against discrimination envisaged in the Convention and the

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<sup>46</sup> On this point, see below, Chapter IV.

<sup>47</sup> On the question of nationality as a ground of discrimination, see below, Chapter I, Section 3, Subsection 1, paras. 36-37.

Recommendation, and many examples quoted in this survey have therefore been drawn from these reports. The Committee has also been able to examine the comments made by a number of employers' and workers' organisations<sup>48</sup> on their governments' reports.<sup>49</sup> Finally, following its usual practice, the Committee has sought to supplement the information available with research into legislation, official documents and other appropriate sources.

15. The information supplied is often incomplete, doubtless due to the fact that the scope of the standards has not always been accurately gauged, both with regard to the diversity of the forms of discrimination covered, and with regard to the types of measures to be taken in order to promote equality and eliminate discrimination. The Committee wishes to emphasise the extent of the obligation set forth in Article 3(f) of the Convention, under which each Member that has ratified the Convention shall "indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action". The achievement of favourable conditions for equality of opportunity and treatment in employment and occupation is a continuing endeavour, and it is the responsibility of each government to continue supplying, in its successive reports, information on developments regarding its policy. The scope of the information that it is necessary to compile concerning legislative measures and regulations and national practice, in order to fulfil this obligation, corresponds to the scope of the fields covered by the Convention and Recommendation. The Committee has previously indicated, by way of illustration, the information concerning the fields covered by the Convention: constitutions and basic national laws; labour legislation in toto; provisions concerning access to particular occupations and their exercise, the civil service, vocational training, social security and welfare services, employment services; provisions relating to the security of the State, those referring to the protection or assistance of certain categories of persons; educational programmes; practical data on the

<sup>48</sup> Austria: Austrian Congress of Chambers of Labour; Bangladesh: Bangladesh Employers' Association, Bangladesh Sangjukt Sramik Federation; Chile: National Workers' Association (CNT); Finland: Finnish Employers' Confederation, Confederation of Salaried Employees; India: Bharatiya Mazdoor Sangh; Ireland: Irish Congress of Trade Unions; Japan: Japanese Confederation of Labour (DOMEI), General Council of Trade Unions (SOHYO); Netherlands: Netherlands Council of Employers' Federations; New Zealand: New Zealand Employers' Federation; Norway: Norwegian Employers' Federation (NAF), Confederation of Trade Unions in Norway; Portugal: Confederation of Portuguese Industry; Sweden: Swedish Central Organisation of Salaried Employees, Swedish Employers' Confederation, Swedish Trade Union Confederation.

<sup>49</sup> There has been a large increase in the number of such comments in relation to the previous General Survey in 1971 (paras. 16 and 20). Furthermore, a number of governments indicated that their reports were prepared in co-operation with representative employers' and workers' organisations.

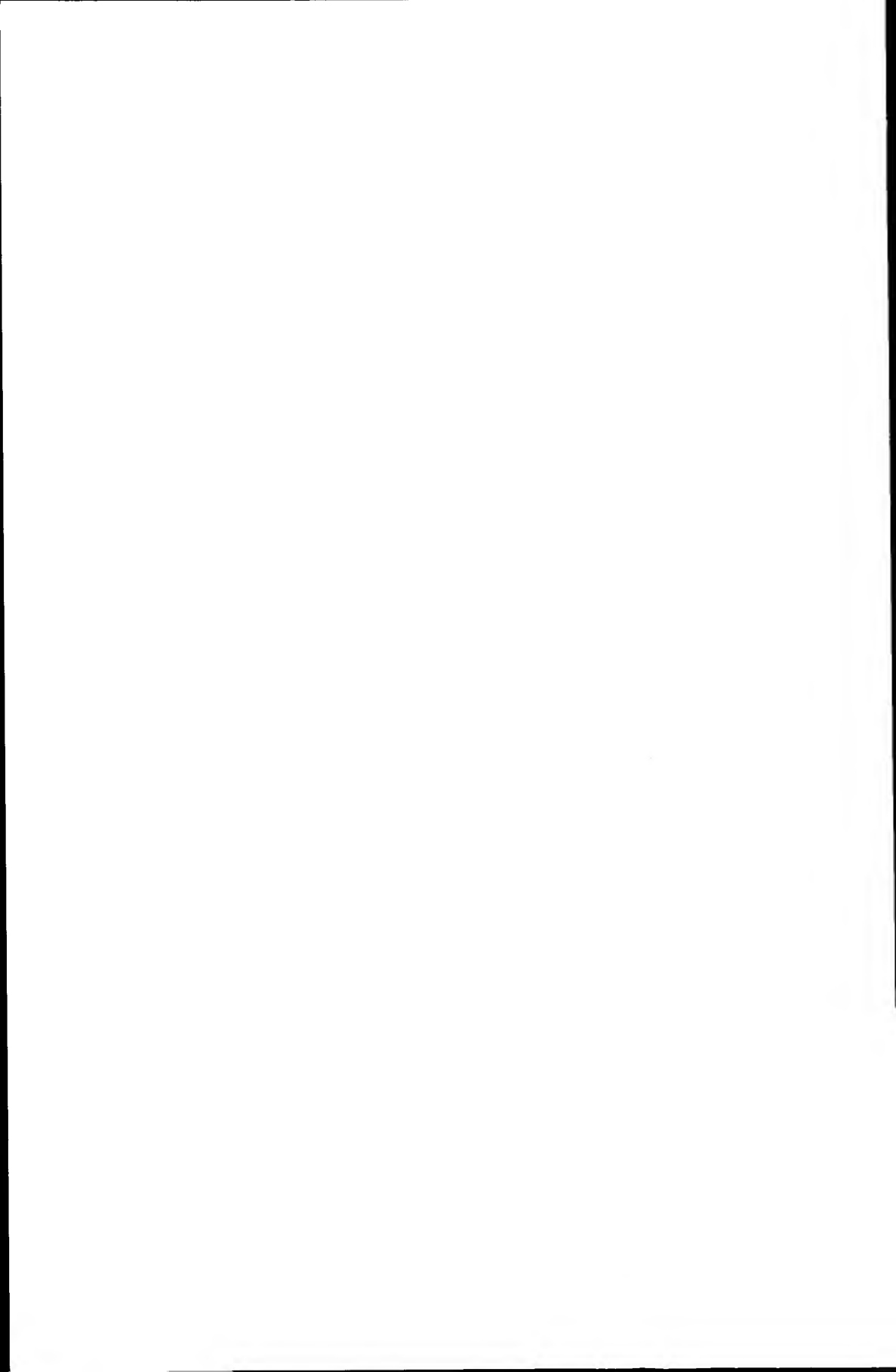
employment of categories of persons defined by race, sex, etc., on wage levels, on the activities and functions of the public services in connection with employment, on the activities of occupational organisations; collective agreements; statistics; rulings of courts or other bodies; information on the machinery for guaranteeing the rights accorded under constitutions or basic laws, etc.<sup>50</sup> To these may be added, information on the activities of specialised bodies for the promotion, implementation and supervision of the policy of equality in countries where it has been considered worthwhile to set up such bodies. The Committee is far from having at its disposal all the information that it would have been interesting to examine, particularly with regard to the practical, everyday application of the policy of equality of opportunity and treatment.<sup>51</sup>

16. The Committee has attached importance, in this as in its previous surveys, to assisting governments in arriving at an assessment of the scope of international standards with regard to their affirmative action for the promotion of equality of opportunity and treatment. The references offered by way of illustration in the survey do not imply that there are no other bodies, practices or comparable situations; nor do they imply any attempt at a final evaluation by the Committee given the additional information which would be necessary for this purpose. In the following chapters, the Committee will refer to the scope of application as regards individuals, the definition and the criteria of discrimination set out in the 1958 instruments (Chapter I), before examining their substantive scope - access to training and employment, conditions of employment - (Chapter II), requirements and measures that do not constitute discrimination (Chapter III) and the implementation of the principles (Chapter IV); the Committee will then formulate its general conclusions (Conclusions).

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<sup>50</sup> General Survey, 1963, para. 18.

<sup>51</sup> In the rare cases in which statistics were supplied, they were generally too fragmentary to be used systematically; such statistics have been used in the survey only for illustrative purposes.



## CHAPTER I

### SCOPE OF THE CONVENTION AS REGARDS INDIVIDUALS, DEFINITION AND GROUNDS OF DISCRIMINATION

#### Section 1. Scope of the Convention as regards individuals

##### Application of the Convention to all persons

17. The Committee of Experts has already emphasised that there is no provision in either the Convention or the Recommendation limiting their scope as regards either individuals or occupations. This is in line with the purpose of these instruments, which is to protect all human beings against the types of discrimination to which they refer.<sup>1</sup> The elimination of discrimination in employment or occupation on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin, therefore concerns both nationals and non-nationals.

18. The Committee of Experts, taking note of a resolution adopted by the International Labour Conference at its 62nd (Maritime) Session, 1976, which referred to the existence of racial discrimination on ships, particularly against seafarers of Asian, African and Latin American origin, recommended that this discrimination should be eliminated "so that, under the same flag, seafarers with the same qualifications should benefit from all the advantages offered by legislation or by collective agreements applicable to seafarers of the country under whose flag the ship is registered",<sup>2</sup> and it requested the governments concerned to indicate, inter alia, the inspection visits or other steps taken to ensure that the Convention is applied in law and in practice, since it "is applicable to all workers".<sup>2</sup> Some countries have indicated that their legislation excluded the employment of seafarers of foreign nationality on board vessels flying their national flag and that consequently there were no discriminatory practices on grounds of race on board their vessels.<sup>3</sup> Most countries have replied that the provisions of their maritime legislation which prohibited discrimination on the basis of race were applicable to both nationals

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<sup>1</sup> General Survey, 1963, para. 32.

<sup>2</sup> RCE 1977, p. 223.

<sup>3</sup> See for example the replies to the general observation contained in the reports of the following States: Tunisia, Maritime Labour Code, s. 2, LS 1967-Tun. 2; German Democratic Republic, Seafarers' Code, s. 4(1), LS 1969-Ger.D.R. 1.



and foreign seafarers.<sup>4</sup> By contrast, reciprocity stipulations governing the application to foreign seafarers of the anti-discrimination provisions in maritime legislation do not appear to be fully in accordance with the Convention, under which a national policy should be adopted to eliminate discrimination based on specific grounds for all persons.<sup>5</sup>

19. In many cases labour laws apply either to any contract concluded between a worker and an employer or an enterprise,<sup>6</sup> or to any worker without distinction as to his or her nationality,<sup>7</sup> and the provisions that they contain respecting equality of opportunity and treatment are applicable to both foreigners and nationals. Several countries that have ratified the Convention have made specific provisions respecting equality applicable to the whole of the national territory, to vessels and aircraft flying their flag or registered in the country, and in some cases to off-shore industrial installations situated on the continental shelf.<sup>8</sup> In certain countries the labour legislation applies to both nationals and foreigners, but the provisions respecting protection against discrimination only cover citizens of the country.<sup>9</sup>

20. In Mongolia, the legislation provides that foreign citizens who are permanently resident in the country shall enjoy the same rights as the citizens of the country with regard to remuneration for work, rest periods, employment protection and medical services.<sup>10</sup> In the Netherlands, a Bill has been brought before Parliament for the purpose of amending the Act governing the access of foreigners,

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<sup>4</sup> Côte d'Ivoire, Cyprus, Gabon, Federal Republic of Germany, Madagascar, Netherlands, Norway, Sudan, Switzerland.

<sup>5</sup> Turkey, Maritime Labour Act, No. 854 of 20 April 1967, s. 4, LS 1967-Tur. 2.

<sup>6</sup> Federal Republic of Germany, Act of 13 August 1980 respecting equality of treatment for men and women at the workplace, LS 1980-Ger.F.R. 3; Poland, s. 2 of the Labour Code; Saudi Arabia, Royal Decree No. M/21 of 15 November 1969 (6 Ramadan 1389) enacting the Labour Code, s. 2, LS 1969-Sau.Ar. 1.

<sup>7</sup> Algeria, Act No. 82-06 of 27 February 1982 respecting individual employment relationships, s. 3 and s. 25, LS 1982-Alg. 2; Cameroon, Law No. 74-14 of 27 November 1974 instituting the Labour Code, s. 1(2), LS 1974-Cam. 1; Colombia, Substantive Labour Code, s. 2; Guinea-Bissau, Labour Code of 5 April 1986, s. 24.

<sup>8</sup> Jamaica, Employment (Equal Pay for Men and Women) Act, 1975, s. 2(3), LS 1975-Jam. 2; Norway, Act No. 45 of 9 June 1978 respecting equality between the sexes, s. 20, LS 1978-Nor. 1; United Kingdom, Act of 1975 to render unlawful certain kinds of sex discrimination, s. 10, LS 1975-UK. 1.

<sup>9</sup> Angola, General Labour Act No. 6, dated 24 August 1981, s. 1(3) and s. 2, LS 1981-Ang. 1; Hungary, Labour Code, s. 18(3), LS 1967-Hun. 2A.

<sup>10</sup> Sixth periodic report submitted by the Mongolian People's Republic, Committee on the Elimination of Racial Discrimination, CERD/C/66/Add.34.



including persons belonging to ethnic minorities,<sup>11</sup> to employment in the public sector. The Bill lays down the jobs reserved for nationals, such as magistrates, police officers, captains of ships, etc., while all other jobs may be filled by foreigners, who should normally be in possession of a work permit, with the exception of nationals of member States of the European Community. This measure comes within the framework of a broader policy respecting minorities intended to create the conditions that are necessary to ensure equality of opportunity. The studies that have been undertaken illustrate that the types of discrimination to which foreigners are subject are principally based, not on nationality, but on grounds such as race and colour. A report submitted to Parliament in 1983 (Minderheidennota), examines the specific measures that have been taken to protect the various national minorities and describes the measures that are contemplated respecting the dissemination of information and public education, employment and housing policies and the institution of a body in which minorities can participate at the national level.<sup>12</sup>

## Migrant workers

21. In ILO instruments, migrant workers are covered by special provisions: under the terms of Paragraph 8 of Recommendation No. 111, regard should be had to the provisions of the Migration for Employment Convention (Revised), 1949 (No. 97) relating to equality of treatment and to those of the corresponding Recommendation with respect to immigrant workers of foreign nationality and the members of their families, relating to the lifting of restrictions on access to employment.<sup>13</sup> After the adoption of the 1958 instruments, Convention No. 97 was supplemented by the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and by Recommendation No. 151, which essentially repeated in Parts II and I respectively the definitions and terms of Convention No. 111. Equality of opportunity is therefore added to equality of treatment with the implication that measures should be taken to promote both. In accordance with Article 11, paragraph 1, of Convention No. 97, the term "migrant for employment" means "a person who migrates"<sup>14</sup> from one country to

<sup>11</sup> See below, para. 34, note 58.

<sup>12</sup> Bill to amend the Act of 4 June 1958, "Staatblad" (Bulletin of Laws, Orders and Decrees, 58). Sixth periodic report submitted by the Netherlands, Committee on the Elimination of Racial Discrimination, CERD/C/106/Add.11.

<sup>13</sup> ILO: Discrimination in the Field of Employment and Occupation, ILC, 40th Session, Report VII(2), p. 111 "... it appears that the Conclusions directed towards a Recommendation would be incomplete without some mention of the position of foreign immigrants who have completed an initial period of regular residence. Since standards in this connection have already been adopted by the International Labour Conference ..., it would appear appropriate to make reference to them ... ."

<sup>14</sup> Article 11, para. 1, of Convention No. 143 adds to this definition "or who has migrated".

another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment". The provisions of Article 6 of Convention No. 97 and those of Part II of Convention No. 143 apply only to immigrants who are legally present within the territory of the member State.

## Section 2. Definition of discrimination

22. Article 1, paragraph 1(a), of Convention No. 111 defines discrimination as "any distinction, exclusion or preference [made on the basis of certain criteria] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". This purely descriptive definition contains three elements:

- a factual element (the existence of a distinction, an exclusion or a preference, without specifying whether this arises from an act or an omission) which constitutes a difference in treatment;
- a ground on which the difference of treatment is based;<sup>15</sup>
- the objective result of this difference in treatment (the nullification or impairment of equality of opportunity or treatment).

Through this broad definition, the 1958 instruments cover all the situations which may affect the equality of opportunity and treatment that they are to promote. An examination of the available information reveals several points that merit special attention. In the first place, the definition of discriminatory measures in certain countries may restrict the protection intended by the Convention. In the second place, certain other specifications concerning the direct or indirect nature of discriminatory acts have been laid down either in legislative provisions, or by courts, or by organisations set up to deal with matters concerning discrimination. Finally, as already emphasised by the Committee in its General Survey of 1963 on the same subject, such distinctions, exclusions or preferences may have their origin in law, but also, particularly, in practice.<sup>16</sup>

### Definitions of discrimination contained in legislation

23. Most texts respecting equality of opportunity and treatment lay down types of distinctions that are prohibited and the fields in which this prohibition is to apply, by specifying that any difference in treatment based on one of the prohibited grounds and applying to one of the fields enumerated (access to employment, to occupation, etc.) a priori constitutes discrimination. Examination of the ground

<sup>15</sup> See Section 3 below.

<sup>16</sup> General Survey, 1963, para. 37. See also, RCE, 1983, p. 208: the Committee indicated that "the fact that discrimination laid down in a provision is put into effect not by administrative decision but by a court decision, even accompanied by procedural guarantees, does not remove it from the scope of the Convention".

on which the distinction is made and of the subject it affects is sufficient to establish the illegitimate nature of the difference in treatment. Cases where considerations based on the race of a person are used to reject his or her application for a job, or where a woman is denied enrolment in an internal further training course on the pretext that women's careers are not long enough to justify the investment are examples of this. Certain laws however define discrimination as any differentiation made to the detriment of a person without material justification or just cause<sup>17</sup> or use the concept of inequitable or unjust distinctions. By this approach arbitrary acts or behaviour will be defined as discriminatory. In some countries it is specified that discrimination based on certain grounds is punishable by law.<sup>18</sup> Through the prohibition thus laid down, the law defines what is deemed to constitute discrimination. In other countries, the legislation respecting discrimination prohibits "all discrimination" or "any form of discrimination"<sup>19</sup> without specifying the grounds of discrimination that are forbidden. Many of the legislative provisions adopted have either incorporated the definition of discrimination set forth in the Convention in its entirety<sup>20</sup> or have added to it. Distinctions, exclusions and preferences have in some cases been supplemented by reference to restrictions,<sup>21</sup> as well as to segregation and separation.<sup>22</sup> In this sense, discrimination refers to the exclusion, in the general meaning of the term, of certain persons because they belong to a group that is defined by intrinsic characteristics.

<sup>17</sup> See for example Austria, s. 2 of the Act of 1979 respecting equality of treatment as between women and men, LS 1979-Aus. 1.

<sup>18</sup> See for example Burkina Faso, s. 1 of the Labour Code; New Zealand, Human Rights Commission Act, No. 49, 1977.

<sup>19</sup> See for example Argentina, s. 172 of Decree No. 390, dated 13 May 1976, to approve a consolidated text of the rules governing contracts of employment, LS 1976-Arg. 1. In general additional provisions and interpretations by case law lay down restrictions that result in a limitation of the general nature of the initial declaration.

<sup>20</sup> Equatorial Guinea, s. 20(3) of the Fundamental Act; Rwanda, s. 25 of the Labour Code.

<sup>21</sup> Portugal, Legislative Decree No. 392/79, of 20 September 1979, to guarantee equality of opportunity and treatment for women and men in work and employment, s. 2(a), LS 1979-Por. 3.

<sup>22</sup> United States, Connecticut, s. 46a-51(6) of the Human Rights and Opportunities Act; Kentucky, s. 344.010(4) of the Fair Employment Practices Act: "Discrimination means any direct or indirect act or practice of the exclusion, distinction, restriction, segregation, limitation, refusal, denial or any other act or practice of differentiation or preference in the treatment of a person or persons [...] or the aiding, abetting, inciting, coercing or compelling thereof."; Minnesota, s. 363.01(10) of the Human Rights Act: "The term 'discriminate' includes segregate or separate and, for the purposes of discrimination based on sex, it includes sexual harassment"; New York, s. 292.19 of the Human Rights Law; Rhode Island, s. 28-5-6 of the Fair Employment Practices Act.

24. Other texts place more emphasis on the fact that discrimination is a violation of the principle of equality of opportunity and treatment. They set forth the principle as a substantive right, which not only incorporates all other rights and freedoms but also covers forms of behaviour which would normally be at the discretion of the individual in economic and social life. These forms of behaviour are covered by the law whenever they are based on grounds defined as being illegal. Certain laws refer to the principle of equality of opportunity and treatment either in general terms<sup>23</sup> or understood as implying the absence of any discrimination based on one or more grounds.<sup>24</sup> In some countries, it is laid down that every individual has the right to full and equal recognition and enjoyment of the fundamental rights and freedoms, including the right to exercise the job or occupation of their choosing, and discrimination occurs when a distinction, exclusion or preference has the effect of nullifying or impairing the recognition or exercise of this right.<sup>25</sup> Similarly, discrimination occurs when on the basis of one of the prohibited grounds a person is treated less favourably than persons who otherwise have the same characteristics or when a person is obliged to fulfil a condition that is not required of other persons.<sup>26</sup> The concept of equality of opportunity and treatment,

<sup>23</sup> Japan, s. 1 of Act No. 113, of 16 June 1972, respecting the improvement of the welfare of women workers, including the guarantee of equal opportunity and treatment between men and women in employment, as amended in 1985, LS 1985-Jap. 1.

<sup>24</sup> Cape Verde, art. 22 of the Constitution; Guinea-Bissau, s. 155(2) of the Labour Code of 5 April 1986; Luxembourg, s. 2(1) of the Act of 8 December 1981 respecting equal treatment for men and women as regards access to employment, LS 1981-Lux. 1; Madagascar, art. 12 of the Constitution; Nicaragua, art. 27 of the 1986 Constitution, LS 1987-Nic. 1; Netherlands, s. 13 of the 1983 Constitution; Peru, art. 2 of the 1980 Constitution, see LS 1984-Per. 1; Somalia, s. 3 of the Labour Code.

<sup>25</sup> Canada, Province of Quebec, s. 10 of the Charter of Human Rights and Freedoms; Costa Rica, s. 1 of Act No. 2694 of 22 November 1960 to prohibit discrimination in employment.

<sup>26</sup> Botswana, art. 15(3) of the Constitution; United States: West Virginia, s. 5-11-3(h) of the Human Rights Act: "The term 'discriminate' or 'discrimination' means to exclude from, or fail or refuse to extend to a person, equal opportunities [...]"; Ireland, Employment Equality Act 1977, LS 1977-Ire. 1; United Kingdom, Race Relations Act 1976, s. 1(a) (LS 1976-UK 2) and Sex Discrimination Act 1975, s. 1(1)(a); Zambia, art. 23 of the Constitution couches discrimination in terms of affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour or creed; Zimbabwe, by virtue of s. 5(6) of the Labour Relations Act No. 16 of 1984, LS 1985-Zim. 1, a person shall be deemed to have discriminated if his act or omission causes or is likely to cause persons of a

(footnote continued on next page)

without discrimination based on one or more grounds, implies that individuals or groups of individuals have identical rights and obligations as far as distinctions based on this ground or these grounds are concerned. The right to equality of opportunity and treatment cannot be envisaged as an absolute right.<sup>27</sup>

25. In several countries, in addition to the general definition of discrimination, the legislative texts enumerate acts or types of behaviour that by their nature are qualified by law as discrimination.<sup>28</sup> Certain texts attempt to cover all the manifestations of discrimination whatever form they may take.<sup>29</sup> In certain countries, the acts and types of behaviour that are enumerated are deemed to be discriminatory, placing the burden on the employer of proving the non-discriminatory nature of the acts or behaviour.<sup>30</sup> In Zimbabwe, the Labour Relations Act of 1984 provides that a person shall be deemed to have discriminated if his act or omission causes or is likely to cause persons to be treated less favourably than other

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(footnote continued from previous page)

particular race, tribe, place of origin, political opinion, colour, creed or sex to be treated less favourably or more favourably than persons of other characteristics of the same nature, unless it is shown that such act or omission was not attributable wholly or mainly to the race, tribe, place of origin, political opinion, colour, creed or sex of the persons concerned.

<sup>27</sup> See Chapter III, Section 1, below.

<sup>28</sup> See, for example, United States, Title VII of the Civil Rights Act of 1964; Ireland, s. 3 of the 1977 Employment Equality Act, LS 1977-Ire. 1; United Kingdom, s. 4 of the 1976 Race Relations Act, LS 1976-UK 2; Sweden, s. 4 of the Act of 17 December 1979 respecting equality between men and women at work, LS 1979-Swe. 2.

<sup>29</sup> See, for example, Australia, s. 5 of the 1984 Sex Discrimination Act: "(1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if, by reason of - (a) the sex of the aggrieved person; (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex. (2) For the purposes of this Act, a person [...] discriminates against another person [...] on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition - (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply; (b) which is not reasonable having regard to the circumstances of the case; and (c) with which the aggrieved person does not or is not able to comply."

<sup>30</sup> See, for example, Sweden, the Act of 1979, cited above.

persons on the grounds of their race, tribe, place of origin, political opinion, colour, creed or sex.<sup>31</sup>

26. Certain definitions of discrimination refer to the intentional nature of discrimination either directly, by linking the illegal nature of the act of discrimination to the intention of its author,<sup>32</sup> or indirectly by defining discriminatory acts and practices in terms that presuppose the intention to practise discrimination or which exclusively address an identifiable author.<sup>33</sup> The limitations on the definition of discrimination that are introduced by reference to its intentional nature are not in accordance with the Convention, which covers all discrimination without referring to the intention of an author of a discriminatory act or even without there needing to be an identifiable author, as in the case of indirect discrimination or occupational segregation based on sex. The direct or indirect nature of discrimination is, however, explicitly covered by a number of provisions.<sup>34</sup>

### Suspect class

27. The concept of suspect class was developed by the Supreme Court of the United States in order to supervise the manner in which the principle of non-discrimination under constitutional law was applied by federal and state authorities. Any distinction shall be deemed suspect if it affects a class that has traditionally been the victim of hostility and prejudice, that has been set aside from the rest of society or that has been viewed in such a stereotypical way that there are serious grounds for doubting that its interests have been suitably taken into consideration in the legislative process or in governmental action. When the members of such a group undertake a legal challenge of legislation or governmental action, the judge must be particularly vigilant and must set aside the usual presumption of constitutionality, since it is more than likely that the legal action has been inspired by customary habits or an intention to discriminate on other than legitimate grounds. A distinction affecting a suspect class is subject to this standard of strict scrutiny and may only be declared valid if it is demonstrated that the difference in treatment was introduced in order to achieve a compelling or overriding governmental objective, and that the difference in treatment was necessary to achieve this objective. Distinctions based on race, national origin and alienage are deemed to be suspect.<sup>35</sup> The Court

<sup>31</sup> S. 5(6) of the 1984 Labour Relations Act.

<sup>32</sup> See, for example, United States, Louisiana, the only section of the Fair Employment Practices Law, subtitled "Intentional Discrimination in Employment".

<sup>33</sup> In the United States a number of state laws refer to the discriminatory acts and practices of employers, labour organisations and employment agencies.

<sup>34</sup> See Section 3 below, paras. 40 et seq.

<sup>35</sup> Distinctions based on certain involuntary characteristics of the individual (race, national origin, but not sex) are thus deemed suspect.

has refused to extend the concept to other categories, such as the disabled, the elderly and women, but in its rulings has introduced an intermediate standard of review establishing the principle that any distinctions that are made must be justified by their close connection to a major objective of the Government. The provisions of the Convention do not establish this type of differentiation when dealing with discrimination, since "any distinction, exclusion or preference" based on one or more of the grounds that are forbidden shall be deemed to be a suspect class whose existence necessitates strict scrutiny.

### The objective consequences of discrimination

28. In referring to "the effect" of a distinction, exclusion or preference on equality of opportunity and treatment in employment and occupation, the definition given by the 1958 instruments uses the objective consequences of these measures as a criterion. Indirect forms of discrimination and phenomena such as occupational segregation based on sex consequently come within the scope of the Convention.<sup>36</sup> The concept of indirect discrimination<sup>37</sup> refers to situations in which apparently neutral regulations and practices result in inequalities in respect of persons with certain characteristics or who belong to certain classes with specific characteristics (race, colour, sex, religion, for example). In a number of countries, the legislation that has been adopted regarding equality between men and women in employment provides that this equality implies the absence of direct or indirect discrimination and gives as an example of indirect discrimination, difference in treatment on the grounds of marital or family status.<sup>38</sup>

### Discrimination in law and in practice

29. Discriminatory treatment may consist both of the adoption of general impersonal standards that establish distinctions based on forbidden grounds, and in the specific attitude of a public authority or a private individual that lead to persons or members of a group

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<sup>36</sup> See General Survey, 1963, para. 38.

<sup>37</sup> The Canadian Human Rights Commission uses the term "systemic discrimination" arising through neutral policies that, although they are applied uniformly, prevent certain classes from having opportunities equal to those enjoyed by others.

<sup>38</sup> In the countries of the European Community, the introduction of this concept was widely encouraged by the Directive of the Council of the Communities on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (76/207/EEC), s. 2(1). See Section 3 below, paras. 40 et seq.



being treated unequally when they should enjoy the same rights and benefits as others.<sup>39</sup>

### Section 3: Grounds of discrimination

30. Not all distinctions, exclusions or preferences in employment or occupation are contrary to the Convention. Those which are considered to be unlawful, and therefore are covered by the national policy to promote equality of opportunity and treatment, are those based on one of the grounds expressly referred to in Article 1, paragraph 1(a) of the Convention, or on a ground determined after consultation with representative employers' and workers' organisations, in accordance with Article 1, paragraph 1(b) of the Convention. Some national provisions respecting discrimination provide that equality of opportunity and treatment shall be implemented "without distinction of any kind" or "without any discrimination", without referring to specific grounds of discrimination or by making only illustrative reference to them. In practice, such provisions may be interpreted as placing upon the person or entity making any distinction the burden of proving that it is justified by the requirements of the job.<sup>40</sup> In general, a limitative enumeration of grounds of discrimination is given in the various provisions respecting equality of opportunity and treatment. Two observations may be made on the basis of the available information: firstly, in a large number of countries, the grounds of discrimination have been the subject of more precise and searching definitions based on national conditions and usage. That greater precision in the delimitation of basis of discrimination has been the work of judges responsible for supervising the application of legislation on equality, but also of the legislature in collaboration with specialised bodies including, in many cases, representatives of

<sup>39</sup> In this connection, see the Report of the Commission appointed under article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Ghana concerning the Observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105). The Commission examined the conditions that are necessary to ensure that national legislation is in full conformity with the requirements of the Convention (supervision, publicity, the existence of effective grievance procedures, systems of penalties) and it indicated that: "where these conditions are fulfilled, a Government cannot be regarded as failing to fulfil its obligations under a Convention because of a violation of its provisions by either an administrative officer or an employer which results in appropriate disciplinary or legal proceedings against the offender; but unless these conditions are fulfilled, a Government cannot disclaim responsibility for the shortcomings of its officers or for the conduct of particular employers." ILO, Official Bulletin, Vol. XLV, No. 2, Supplement II, para. 716, pp. 230-231.

<sup>40</sup> See Canada, RCE 1986, pp. 263-265, point 2 of the observation.



employers' and workers' organisations. This trend is well illustrated by the multitude of constitutional and legislative provisions and regulations in existence.<sup>41</sup> Secondly, in some countries measures have been adopted to ensure equality of opportunity and treatment against forms of discrimination not referred to in Article 1, paragraph 1(a) of the Convention, thus giving rise to the determination of further grounds of discrimination in accordance with Article 1, paragraph 1(b), of the Convention.

## Subsection 1. Grounds of discrimination referred to in Article 1, paragraph 1(a), of the Convention

31. Article 1, paragraph 1(a), of the Convention and the corresponding provisions of the Recommendation refer to a restrictive list of seven grounds of discrimination: race, colour, sex, religion, political opinion, national extraction and social origin. The preparatory work to the Convention reveals that the origin of the grounds is attributable to the Universal Declaration of Human Rights.<sup>42</sup> In 1955, the Governing Body expressed the view "that the documents submitted to the Conference should deal with discrimination on all the grounds listed in Article 2(1) of the Universal Declaration ...".<sup>43</sup> The grounds of discrimination that were taken up refer to individual qualities, characteristics and attributes which are immutable, such as race or colour, or which stem from social categorisations, such as political opinion or religion. The international instruments adopted subsequently to the Convention emphasise that discrimination based on such grounds is contrary to human dignity.<sup>44</sup> In practice, the distinction between various

<sup>41</sup> By virtue of Article 3(b) of the Convention each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice - [...] (b) to enact such legislation [...] as may be calculated to secure the acceptance and observance of the "national policy" referred to in Article 2 of the Convention.

<sup>42</sup> The grounds referred to in para. II(a) of the Declaration of Philadelphia, which predates the Universal Declaration of Human Rights, are limited to race, creed or sex: "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".

<sup>43</sup> ILO: Discrimination in the Field of Employment and Occupation, ILC, 40th Session, 1957, Report VII(1), question 7, pp. 1 and 30; see also the questionnaire sent to States, p. 33 of the same Report. Certain grounds of discrimination envisaged on that occasion were not taken up in the 1958 instruments.

<sup>44</sup> United Nations Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by the General Assembly of the United Nations on 20 November 1963 (resolution 1904 (XVIII)), Article 1: "Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity ..."; Convention on (footnote continued on next page)

grounds of discrimination may be a fine one in view of the fact that an individual may be subject to discrimination based on several grounds. The Committee of Experts has noted that social origin may be considered as presumptive even if evidence of certain political opinions which work either to the advantage or disadvantage of the persons concerned.<sup>45</sup> This can also be seen to be true in the case of religion, race and colour. In Australia, in the area of discrimination, based on sex, marital status or pregnancy, the doing of an act is deemed to be discriminatory even if it is based on several grounds, provided the grounds include one of the specific grounds covered by the law, whether or not that particular ground is the dominant or substantial reason for the doing of the act.<sup>46</sup> Some of the grounds of discrimination listed in the 1958 instruments are immediately apparent, such as colour and sex, and, to a lesser extent, race; the connection between the possession of one of these attributes and the nullification or impairment of equality can be established without major difficulties. In Canada, the term "visible minorities" was chosen, after consultations with the representatives of minority groups, in order to collectively designate persons who are distinguished from the rest of the population by their race and colour, and their relatively small number.<sup>47</sup> The purpose of using this term was not to cast any racial innuendo but rather to face up openly to the needs and potential problems of such persons so that their situation could be examined and employment and other programmes implemented in order to redress inequities.<sup>47</sup> Other grounds, such as social origin and political opinion, are not necessarily revealed by distinctive external features within the framework of employment and occupation. Difficulties may therefore arise in providing proof of discrimination, particularly when the burden of proof lies with the injured party.

32. The grounds for discrimination envisaged in the Convention and Recommendation are very diverse and an examination of the reports reveals that they are not all given equivalent attention by the

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the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on 18 December 1979 (resolution 34/180), Preamble: "Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity ..."; Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, proclaimed by the General Assembly of the United Nations on 25 November 1981 (resolution 36/55), Article 3: "discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity ...".

<sup>45</sup> General Survey, 1963, para. 29; see also Netherlands, para. 20, note 12.

<sup>46</sup> Sex Discrimination Act 1984, s. 8.

<sup>47</sup> See CERD/C/SR.781, pp. 6-7. The annual report of the Canadian Human Rights Commission for 1985 uses the expression "visible minorities", Canadian Human Rights Commission, Annual Report 1985, p. 16.

authorities concerned. Combating discrimination that is based on grounds of sex involves the use of methods that differ substantially from those employed in the event of impairment of equality on the basis of religion or political opinion. It would appear from an examination of the reports that certain grounds for discrimination, and particularly sex, have been given particular attention by governments, with the frequent result that machinery has been established to provide for the practical implementation of the national policy envisaged in Article 2 of the Convention. By contrast, some reports indicate that other grounds of discrimination are not encountered in practice, and in some cases there is even no mention made of them in the reports. The Committee of Experts has already noted<sup>48</sup> that it is essential, when reviewing the position and deciding on the measures to be taken, that governments should give their attention to all the grounds of discrimination envisaged in the 1958 instruments.

## A. Race and colour

33. It is preferable to examine discrimination on the basis of race and colour together since difference of colour is only one of the ethnic characteristics, although it is the most apparent, that differentiate human beings. These distinctions are covered by a very large number of constitutional and legislative provisions. In many countries the law expressly refers to these two grounds of discrimination.<sup>49</sup> The legislation in some countries only refers to

<sup>48</sup> General Survey, 1963, para. 22.

<sup>49</sup> Provisions respecting race and colour: Angola, art. 18 of the 1981 Constitution; Antigua and Barbuda, arts. 3 and 14(3), (5), and (7) of the 1981 Constitution; Barbados, art. 23 of the Constitution; Belize, art. 3 of the 1981 Constitution; Botswana, ss. 3, 10(13) and 15(3) of the 1966 Constitution; Burundi, art. 11 of the 1981 Constitution; Canada, s. 15(1) of the Canadian Human Rights Act; Costa Rica, s. 1 of Act No. 2694 of 22 November 1960; Cuba, arts. 41 and 42 of the 1976 Constitution; Dominica, art. 13 of the 1967 Constitution; Ecuador, art. 19 of the 1979 Constitution; Fiji, arts. 3 and 15(2) of the 1970 Constitution; Guyana, arts. 40(1) and 149(1), (4) of the 1980 Constitution; Islamic Republic of Iran, art. 19 of the 1979 Constitution; Jamaica, art. 24 of the 1962 Constitution; Kenya, art. 70 of the Constitution; Malawi, art. 2 of the 1966 Constitution; Malta, art. 32 of the 1964 Constitution; Mauritius, arts. 3 and 16 of the 1968 Constitution; Mozambique, art. 26 of the 1975 Constitution; New Zealand, Race Relations Act 1971, LS 1971-NZ 1, and Human Rights Commission Act 1977; Papua New Guinea, art. 5 of the 1975 Constitution; Rwanda, art. 16 of the 1978 Constitution; Saint Lucia, art. 1 of the 1978 Constitution; Seychelles, art. 3(v) of Schedule 2 to the 1979 Constitution; Sierra Leone, arts. 5 and 17 of the 1978 Constitution; Solomon Islands, arts. 3 and 15 of the 1978 Constitution; Sudan, art. 17(2) of the 1985 Constitution; Sweden, s. 15 of the 1976/1977 Fundamental Act (footnote continued on next page)

one or the other of these two grounds of discrimination,<sup>50</sup> but the information supplied shows that in practice protection is provided at the same time against discrimination based on grounds of race or on

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and Ethnic Discrimination (Prohibition) Act of 5 June 1986; Trinidad and Tobago, art. 4 of the 1976 Constitution; Turkey, art. 10 of the 1980 Constitution; United Kingdom, 1976 Race Relations Act; United States, XVth Amendment to the Constitution; Zambia, arts. 13 and 25 of the Constitution; Zimbabwe, arts. 11 and 23 of the 1979 Constitution.

<sup>50</sup> Reference is made only to race: Afghanistan, art. 28 of the 1980 Constitution; Algeria, art. 39(3) of the 1976 Constitution; Austria, art. 14(6) of the 1929 Constitution as amended in 1984; Bahrain, art. 18 of the 1973 Constitution; Bolivia, art. 6 of the 1967 Constitution; Bulgaria, art. 35(2) and (4) of the 1971 Constitution; Burma, art. 22 of the Constitution; Cameroon, Preamble to the 1972 Constitution, para. 4; Central African Republic, art. 3 of the 1981 Constitution; China, art. 34 of the 1982 Constitution, LS 1983-China 1; Comoros, Preamble to the 1978 Constitution, para. 3; Côte d'Ivoire, art. 6 of the 1960 Constitution as amended in 1963; Czechoslovakia, art. 20(2) of the 1960 Constitution; Djibouti, art. 219 of the 1977 Constitutional Act; Egypt, art. 40 of the 1980 Constitution; El Salvador, art. 3 of the 1983 Constitution; Equatorial Guinea, art. 20, para. 3(1) of the 1982 Constitution; Ethiopia, art. 36, para. 1 of the Constitution; France, arts. 2 and 77 of the 1958 Constitution; Gabon, art. 1, para. 8 of the 1975 Constitution; German Democratic Republic, art. 20(1) of the 1974 Constitution; Greece, art. 5(2) of the 1975 Constitution; Guinea, arts. 6 and 13 of the 1982 Constitution; Honduras, art. 60, para. 2 of the 1982 Constitution; India, arts. 15 and 16, para. 2 of the 1949 Constitution; Italy, art. 3 of the 1947 Constitution; Japan, art. 14 of the Constitution; Jordan, art. 6 of the 1984 Constitution; Liberia, art. 11(b) of the 1984 Constitution, which came into force on 6 January 1986; Malaysia, art. 8, para. 2 and art. 12 of the 1957 Constitution; Mali, arts. 1, 6 and 16 of the 1974 Constitution; Mongolia, arts. 76 and 83 of the 1960 Constitution; Nepal, art. 10, paras. 2 and 3 of the 1962 Constitution; Netherlands, art. 1 of the 1983 Constitution; Nicaragua, art. 27, para. 1 of the 1986 Constitution; Panama, arts. 19 and 62 of the 1972 Constitution; Peru, art. 2, para. 2 of the 1979 Constitution; Poland, arts. 67(2) and 81(1), (2), of the 1952 Constitution, as amended in 1985; Portugal, arts. 13(2) and 60 of the 1976 Constitution, as amended in 1982; Qatar, art. 9 of the Provisional 1970 Constitution; Romania, art. 17, paras. 2 and 3 of the 1965 Constitution; Sao Tome and Principe, art. 15(1) of the Constitution; Senegal, art. 4 of the 1963 Constitution; Singapore, arts. 12(2) and 16 of the 1980 Constitution; Spain, art. 14 of the 1978 Constitution; Sri Lanka, art. 12(2) and (3) of the 1978 Constitution; Suriname, art. 2(2) of the 1982 Constitutional Decree; United Arab Emirates, art. 25 of the 1971 Constitution; USSR, art. 34 of the 1977 Constitution, LS 1977-USSR 2; Venezuela, art. 61 of the 1961 Constitution; Yugoslavia, art. 154 of the 1974 Constitution; Zaire, art. 12(2) of the 1978 Constitution.

grounds of colour. It appears that the term "race" is frequently used erroneously to refer to population groups which could more accurately be described as linguistic communities or minority groups whose identity is based on cultural or religious characteristics, or as nations. The difficulty lies in establishing a definition of what should be understood by the terms "race" and "colour".<sup>51</sup> In one sense, attempts to define race and colour are of little value in the application of legislation that is intended to combat discrimination in so far as it is not the race, colour or ethnic origin of the person who is discriminated against that is really the point at issue, but rather the negative aspects that the author of the discrimination imputes to the person who is the object of discrimination. Some laws with the specific objective of combating racial discrimination combine, under "on the basis of race",<sup>52</sup> race, colour and also nationality and ethnic or national origin.<sup>53</sup> In some countries, the bodies responsible for applying the legislation respecting equality in the various regions have not attempted, with one exception,<sup>54</sup> to define or specify the concept of race, colour or ethnic origin when this has been invoked by the complainant. In all cases, either by

<sup>51</sup> With regard to definitions of race, see UNESCO, Four Statements on the Race Question, Paris, 1971.

<sup>52</sup> See United Kingdom, Employment Appeal Tribunal, decision given on 28 October 1983; the Tribunal held that the dismissal of the director of a cinema who had refused to carry out a racially discriminatory instruction was equivalent to dismissal "on racial grounds". In the normal sense, these terms would include any motive of an act based on racial grounds, whether the race was that of the person affected by the act or of other persons. The director was treated in a different manner than a director who did not refuse to carry out the racially discriminatory instruction would have been; therefore, he was discriminated against on grounds of race. Industrial Relations Law Reports, 1984, p. 7.

<sup>53</sup> Luxembourg, s. 454 of the Penal Code as amended by the Act of 9 August 1980, to implement the International Convention on the Elimination of All Forms of Racial Discrimination; New Zealand, the 1971 Act cited above, s. 5 (colour, race, or ethnic or national origins of that person or of any relative of that person ... or of any associate of that person) and Labour Relations Act 1987, s. 211, LS 1987-NZ 1; Sweden, Ethnic Discrimination (Prohibition) Act of 5 June 1986, cited above, s. 1 of the Act makes reference as grounds of discrimination to race, colour, ethnic or national origin and religion; United Kingdom, 1976 Race Relations Act, cited above, s. 3(1); under the Act "racial group" means any group of persons defined by reference to colour, race, nationality or ethnic or national origins.

<sup>54</sup> Canada, the 1976 Board of Inquiry of Alberta, Ali v. Such; in this case the complaint described the complainant as being "a black Trinidadian". Applying dictionary definitions to this case, the Board concluded that "Ms. Ali belongs to the Negroid race, and, characteristically, the Negroid race has black or dark skin".

observation or testimony it was assumed that if the discriminatory act was proved, the prohibited ground was obvious. In the United States, the local educational authorities appealed against a school desegregation order on the grounds that it contained no definition of a Negro. The Federal Court of Appeals rejected this appeal and emphasised that "the record indicates that in the past the School District has apparently had no difficulty in identifying Negroes for the purpose of segregating them. For desegregation they can be identified with similar ease".<sup>55</sup> In France a decision given by a Court of Cassation is a good illustration of the difficulties encountered in certain cases in establishing a rigorous distinction between grounds such as race and nationality. When an employer ended the probationary period of a worker on the grounds of his nationality, the Court applied provisions prohibiting discrimination on grounds of race in order to establish the improper nature of the termination of the employment contract.<sup>56</sup>

34. In general terms, discrimination against ethnic minorities<sup>57</sup> is considered as racial discrimination.<sup>58</sup> But distinctions can be drawn between the situation of ethnic minorities, in particular indigenous and tribal groups, and that of any other minorities disadvantaged on racial grounds. In some countries, racial minorities are comprised largely of immigrant workers, or the

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<sup>55</sup> United States, United States v. Falgler County School District, 457 F.2d 1402 (1972).

<sup>56</sup> Court of Cassation, Criminal Chamber, 14 October 1986, Sieur Alric.

<sup>57</sup> Because of the different connotations of the terms "ethnic minority" which vary with national legislation, the concept of "ethnic minority" used in the present survey differs in several instances considerably from the tentative definition of the term "minority" suggested by the Special Rapporteur for the study on the rights of persons belonging to ethnic, religious and linguistic minorities, which was drawn up solely with the application of article 27 of the International Covenant on Civil and Political Rights in mind. In that precise context, the term "minority" may be taken to mean: "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." (E/CN.4/Sub.2/384).

<sup>58</sup> This is clear from Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, under which the term of "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

descendants of immigrants, who have entered the country in order to perform low-paid labour. They may be the descendants of slaves, of indentured workers, or of persons who have immigrated of their own accord to the country of destination during periods of labour shortage. In any event, they comprise persons whose ancestors, or who themselves, have departed from their countries of origin and entered new societies, frequently in a situation of comparative disadvantage with regard to the citizens of the country where they now reside.<sup>59</sup> While certain racial minorities may have been able to overcome this initial disadvantage, this is very often not the case. Many live in extreme poverty, often in urban ghettos, and possess few assets or competitive skills. For them, the essential aim of affirmative action programmes is to provide preferential treatment in education and training programmes, or in systems of recruitment and promotion for salaried positions. Special measures thus aim to overcome this initial disadvantage, and to enable these racial minorities eventually to compete on an equal footing with other members of national society. Measures thus seek to train and help the disadvantaged persons adapt to the available employment opportunities, rather than adapting employment and training opportunities to the particular characteristics of the persons concerned.

35. In the case of indigenous and tribal populations,<sup>60</sup> the situation can be fundamentally different. In certain cases, when past policies have done little to protect indigenous land and cultures and have favoured integration, the situation of disadvantaged indigenous and tribal groups may indeed be similar to that of all other racially disadvantaged groups. These peoples may have lost their roots and may have migrated to urban areas where they are severely disadvantaged in the regular labour market. And in rural areas too, if indigenous and tribal peoples have lost all or most of their traditional lands, and are now working as agricultural labourers, the main employment-related problem confronting them may be de facto discrimination in conditions of employment. And if they earn their livelihood as subsistence farmers alongside non-indigenous peasants and tenant farmers, their main problems arise from unequal access to credit, marketing facilities, agricultural extension and skills training facilities. In all these cases state policies will need to focus on equal opportunity in providing the skills, assets and resources on an equal basis as they are made available to other sectors of the national population. In the majority of cases, perhaps most particularly in the developing countries, where special measures have been adopted for these groups, they have been directed towards employment opportunities outside the

<sup>59</sup> In some cases, the members of these ethnic minorities or their descendants are citizens of the country where they now reside; discrimination affecting them could be classified as being on grounds of national extraction.

<sup>60</sup> Indigenous and tribal populations are covered by the provisions of the Indigenous and Tribal Populations Convention, 1957 (No. 107), the partial revision of which has been included on the agenda of the 75th Session of the ILC.

traditional areas of occupation of indigenous and tribal peoples. They have also aimed to provide more genuine equality of opportunity in traditional occupations, whether in shifting and nomadic agriculture, or in sedentary agriculture, or in crafts. In many countries, despite the continued loss of their traditional lands over the past centuries, indigenous and tribal peoples have to a greater or lesser extent been able to preserve institutions, customs and occupational lifestyles very different from those of other population groups and have increasingly expressed their concern that these differences should be protected and safeguarded by special legislative and administrative measures. One particularly vulnerable group are isolated forest dwellers, who have had little or no contact with the remainder of national society until quite recently, and for whom unregulated contact with outsiders can have highly deleterious consequences. In the case of forest dwellers threatened by outside contact, perhaps in the context of national development programmes, employment promotion measures in themselves may be of less importance than measures to safeguard indigenous and tribal control over natural and environmental resources and measures enabling them to exercise some control over development programmes within their areas of traditional habitation. In many other cases, indigenous and tribal peoples have experienced a greater degree of de facto integration within the national economy earning their livelihood alongside other sectors of the rural population. They may, however, have pursued farming and occupational systems in accordance with traditional practices and customs, with a separate legal status recognised for their communities under national legislation. In a number of countries, where past legislation and policies may have sought the gradual elimination of separate indigenous forms of land use and ownership, recent policies have given new recognition to indigenous communities, adopting new legislation both to protect these communities and to provide preferable treatment to them within the framework of overall rural development policies. It is factors such as these which can place the occupational situation and needs of indigenous and tribal peoples in a different category from other disadvantaged population groups. For these peoples, preferential measures in the area of employment and occupation can with difficulty be divorced from wider-ranging measures which affect all aspects of indigenous and tribal lands and livelihood; and it should be understood that such differences are likely to last for an indefinite period.

#### B. National extraction

36. The concept of national extraction in the 1958 instruments is not aimed at the distinctions that may be made between the citizens of the country concerned and those of another country, but covers distinctions made on the basis of a person's place of birth, ancestry or foreign origin. Distinctions made between citizens of the same country on the basis of the foreign birth or origin of some of them are one of the most evident examples. In France, the prohibition on foreigners who have been naturalised for less than five years from taking jobs in public employment that do not involve their appointment



as civil servants has been abolished by law.<sup>61</sup> In some countries, regulations respecting access to the public service still establish conditions concerning the length of time the person has been a national.<sup>62</sup> In Sweden, surveys mentioned by the Government in its report had revealed differences in the employment rates of various categories of foreigners which might be based, in particular, on race or on national extraction; the body responsible for these matters recommended that a law prohibiting such discrimination should be enacted.<sup>63</sup> In the United States, federal legislation has been amended in order to prohibit discrimination against any individual, other than an unauthorised alien, on the grounds of his or her national origin, or of his or her naturalisation in the case of a citizen or a person who has applied for citizenship.<sup>64</sup> The Constitution of Haiti contains a provision to the effect that citizens are equal before the law, subject to the benefits conferred upon citizens who have never renounced their nationality.<sup>65</sup> To the extent that these benefits do not directly or indirectly concern employment or occupation in the sense of the Convention, they should have no bearing on its application. In some countries, constitutional or legislative provisions establish distinctions between various categories of citizens based on factors such as national extraction,<sup>66</sup> or on a series of grounds including, in addition to national extraction, elements such as language and religion.<sup>67</sup>

<sup>61</sup> Act of 9 January 1973 repealing s. 81 of the French Nationality Code, enacted by the Order of 19 October 1945; in its opinion of 17 May 1973, the Council of State, which had been consulted on the way in which the Act of 9 January 1973 might affect the employment of foreigners, indicated that the requirement of French nationality only concerned the employment of civil servants, and that no legislative provision currently in force nor any principle of French public law forbade in a general manner the recruitment of foreigners as state employees under contracts of employment or as auxiliary staff members. The Court of Justice of the European Communities, in an Order dated 3 June 1986, recalled that access to certain jobs could not be restricted to citizens of the Community on the ground that the persons to be employed in these jobs were covered by regulations involving their appointment as civil servants, Commission of the European Communities against the Republic of France, 307/84.

<sup>62</sup> See for example, Algeria, s. 31 of Decree No. 85-59 of 23 March 1985 issuing model regulations governing employees of public institutions and administrations.

<sup>63</sup> Ethnic Discrimination (Prohibition) Act of 1986, cited above.

<sup>64</sup> Immigration Reform and Control Act of 1986, s. 274(B), LS 1986-USA 1.

<sup>65</sup> 1987 Constitution, art. 18.

<sup>66</sup> Fiji; a distinction is established between indigenous Fijians and Rotumans and other nationals of Asian origin.

<sup>67</sup> Malaysia, art. 160(2) of the Constitution defines "Malay" as a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and was born before Merdeka in the Federation or in Singapore, or born of parents meeting these requirements.

These distinctions are generally intended to establish a balance between communities of various origins and indeed of different races. They generally affect training and employment, particularly public employment, by reserving jobs for members of a specific group.<sup>68</sup>

37. The ground of national extraction has been defined in a number of countries to include related grounds for discrimination. This is the case for language, which is recognised in many Constitutions<sup>69</sup> and labour codes or special laws as a prohibited ground of discrimination and which reflects national extraction and in certain cases racial considerations. This is also the case with regard to the place of birth<sup>70</sup> or the State or region of origin<sup>71</sup> or again ethnic origin.<sup>72</sup> In a certain number of States, nationality, in the meaning that the term can take to designate membership in one of several ethnic communities comprising the citizens of the country, or again citizenship of a federated State within the framework of a federal State, is deemed a prohibited ground

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<sup>68</sup> Fiji, s. 2(d) of the Fiji Service Commission and Public Service (Amendment) Decree 1987; "The Public Service Commission shall ensure that, in so far as possible, each level of each Department in the Public Service shall comprise not less than 50 per cent of indigenous Fijians and Rotumans." Malaysia, art. 153(2) of the Constitution; the Yang Di-Pertuan Agong, acting on the guidance of the Cabinet, shall reserve for Malays, as defined in art. 160(2) of the Constitution, a reasonable proportion of positions in the public service.

<sup>69</sup> Afghanistan, art. 28 of the Constitution; Austria, art. 7(1) of the Constitution; Bahrain, art. 18 of the Constitution; Bolivia, art. 6 of the Constitution; Djibouti, s. 2(1) of the 1977 Constitutional Act; Ecuador, art. 19(4) of the Constitution; Equatorial Guinea, art. 20, para. 3(1), of the Constitution; Federal Republic of Germany, art. 3(3) of the Constitution; Greece, art. 5(2) of the Constitution; Islamic Republic of Iran, art. 19 of the Constitution; Italy, art. 3 of the Constitution; Jordan, art. 6 of the Constitution; Mali, art. 1 of the Constitution; Nicaragua, art. 27, para. 1, of the Constitution; Portugal, art. 60(1) of the Constitution; Somalia, art. 6 of the Constitution; Sri Lanka, art. 12 of the Constitution; Suriname, art. 2(2) of the 1982 Constitutional Decree; Turkey, art. 14 of the Constitution; USSR, art. 34 of the Constitution; Yugoslavia, art. 154 of the Constitution.

<sup>70</sup> Angola, art. 18 of the Constitution; India, art. 15 of the Constitution; Malta, art. 32 of the Constitution; Mauritius, art. 16 of the Constitution; Mozambique, art. 26 of the Constitution; Pakistan, arts. 26(1) and 22(3)(b) of the Constitution; Papua New Guinea, para. 5 of the Preamble to the Constitution; Sri Lanka, art. 12 of the Constitution; Zaire, art. 122 of the Constitution.

<sup>71</sup> Portugal, art. 13(2) of the Constitution; Saint Lucia, Schedule 3 to the Constitution; Sierra Leone, art. 12(2) of the Constitution; Solomon Islands, arts. 3 and 15 of the Constitution.

<sup>72</sup> Sweden, Ethnic Discrimination (Prohibition) Act, cited above.

of discrimination.<sup>73</sup> A particular problem arises with regard to member States of the European Community, which are under the obligation to apply the principle of the freedom of establishment under article 48 of the Treaty of Rome.<sup>74</sup> The exceptions envisaged under the Treaty are interpreted in a restrictive manner by the Court of Justice of the European Communities.<sup>75</sup>

## C. Sex

38. Distinctions based on sex include those which are made explicitly or implicitly, to the disadvantage of one sex or the other. While in the great majority of cases, and particularly in cases of indirect discrimination, it would appear that distinctions based on sex are detrimental to women, several countries emphasised in their reports that the protection provided against discrimination applies equally to either sex under the terms of the legislation itself or its interpretation in the courts. In general, provisions to prohibit discrimination are drawn up in sufficiently neutral terms for their application to both men and women not to raise any particular

<sup>73</sup> Australia, art. 117 of the 1942 Constitution, as amended up to 1977; Byelorussian SSR, art. 34 of the Constitution (this section refers to citizens of different races and nationalities); Bulgaria, art. 35(2) of the Constitution; China, art. 34 of the Constitution; Czechoslovakia, art. 20(2) of the Constitution; Hungary, art. 61, para. 2, of the 1949 Constitution, as amended in 1972; Mongolia, arts. 76 and 83 of the Constitution; Poland, art. 67(2) of the Constitution; Romania, art. 17, paras. 2 and 3, of the Constitution; United Arab Emirates, art. 25 of the Constitution; USSR, art. 36 of the Constitution (see Byelorussian SSR); Yugoslavia, art. 154 of the Constitution.

<sup>74</sup> In the field of employment and occupation, where the member States of the Community thus grant equality with their own citizens to nationals of other member States, they are introducing inequality of treatment between the latter and other foreign workers on grounds of national extraction. However, in so far as the Community may be considered to be a confederation in the process of being formed, and since the Convention permits distinctions between citizens and non-citizens, preferential treatment of nationals of other member States of the Community may be considered as being that given to nationals.

<sup>75</sup> Court of Justice of the European Communities, Order of 12 February 1974, Sotgiu v. Deutsche Bundespost; Order of 17 December 1980, Commission v. Kingdom of Belgium, 149/79; Order of 3 June 1986, Commission v. Republic of France, 307/84; Order of 3 July 1986, Lawrie-Blum v. Land Baden-Württemberg, 66/85; Order of 16 June 1987, Commission v. Republic of Italy, 225/85; the criterion upon which it may be determined whether a job is covered by the exception provided under s. 48, para. 4, of the Treaty for employment in the public administration, is a functional criterion which takes into account the duties involved in the particular job; see below Chapter III, Section 1.

difficulties. Some countries have specified in the legislation they have adopted that provisions respecting discrimination on the basis of sex to the detriment of women are to be interpreted as applying equally to the treatment of men and shall have effect for that purpose, with such modifications as are necessary.<sup>76</sup> In a country that has ratified the Convention, a court found an airline company guilty of sex discrimination regarding recruitment, an offence under the Penal Code, for rejecting the application of a man for a job as a flight attendant, telling him that it was seeking only women staff.<sup>77</sup> In the United States, the Supreme Court found that restricting admissions to a nursing school to women was illegal.<sup>78</sup> These types of discrimination are subject to the supervision of the courts in order to ascertain that the intended objective of the measure does not reflect archaic and stereotyped concepts with regard to the respective roles of men and women. Such archaic and stereotyped concepts, which differ according to country, culture and customs, are at the origin of types of discrimination based on sex and all lead to the same result: the nullification or impairment of equality of opportunity and treatment. Occupational segregation according to sex, which leads to the concentration of men and women in different occupations and sectors of activity, is to a large extent the product of these archaic and stereotyped concepts.<sup>79</sup>

39. The principle of equality between men and women is enshrined in a very large number of constitutional texts<sup>80</sup> which provide

<sup>76</sup> United Kingdom, Act of 1975 to render unlawful certain kinds of sex discrimination, s. 2, LS 1975-UK 1.

<sup>77</sup> France, Morlaix Correctional Court, 20 January 1984; the fact that the company was able to prove that its clients, who consisted mainly of businessmen, preferred female cabin staff, did not constitute legitimate grounds under the terms of the Penal Code.

<sup>78</sup> Mississippi University for Women v. Hogan, 458 US 718 (1982).

<sup>79</sup> See below, Chapter II, Section 2, paras. 97 and 98.

<sup>80</sup> Afghanistan, art. 28 of the Constitution; Algeria, art. 39(3) of the Constitution; Angola, art. 18 of the Constitution; Antigua and Barbuda, art. 3 of the Constitution; Austria, art. 7(1) of the Constitution; Bangladesh, s. 27 of the 1972 Martial Law, as amended in 1986; Belize, art. 3 of the Constitution; Bolivia, art. 6 of the Constitution; Botswana, art. 3 of the Constitution; Bulgaria, art. 35(2) of the Constitution; Burma, art. 22 of the Constitution; Burundi, art. 11 of the Constitution; Byelorussian SSR, art. 33 of the 1978 Constitution; Cape Verde, s. 22 of the 1980 Constitution; Central African Republic, art. 3 of the Constitution; China, art. 48 of the Constitution; Comoros, art. 3 of the Constitution; Côte d'Ivoire, art. 6 of the Constitution; Cuba, art. 43 of the 1976 Constitution; Czechoslovakia, arts. 20(3) and 27 of the Constitution; Djibouti, s. 2(1) of the Constitutional Law; Dominica, art. 1 of the Constitution; El Salvador, art. 3 of the Constitution; Ecuador, art. 44 of the Constitution and s. 19, para. 2(3), of the Fundamental Charter; Equatorial Guinea, art. 20, para. 3(1), of the Constitution; Ethiopia, art. 36(1) of the Constitution; Fiji, art. 3 of the Constitution;

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either for equality of rights without discrimination on the basis of sex, or prohibit discrimination based on such grounds. The principle is also enshrined more specifically, with regard to employment and occupation, in labour codes<sup>81</sup> and in special legislative

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France, art. 2 of the Constitution; Gabon, art. 1, para. 4, of the Constitution; Gambia, art. 13 of the 1970 Constitution, LS 1970-Gam. 1; German Democratic Republic, art. 20(2) of the Constitution; Federal Republic of Germany, art. 3(2)(3) of the Constitution; Guinea, art. 6 of the Constitution; Guinea-Bissau, art. 13 of the Constitution; Honduras, art. 60, para. 2, of the Constitution; Hungary, art. 61(2) of the Constitution; India, art. 15 of the Constitution; Italy, art. 3 of the Constitution; Jamaica, art. 13 of the Constitution; Japan, art. 14 of the Constitution; Jordan, art. 6 of the Constitution; Kenya, art. 70 of the Constitution; Liberia, arts. 11(b) and 18 of the Constitution; Madagascar, art. 12 of the Constitution; Mali, art. 16 of the Constitution; Malta, art. 45, para. 3, of the Constitution; Mauritius, art. 3 of the Constitution; Mexico, art. 4 of the Constitution; Mongolia, arts. 76 and 84 of the Constitution; Mozambique, art. 26 of the Constitution; Nepal, art. 10, paras. 2 and 3, of the Constitution; Papua New Guinea, art. 5 of the Constitution; Peru, art. 2, para. 2, of the Constitution; Poland, arts. 67(2) and 78 of the Constitution; Portugal, art. 13 of the Constitution; Qatar, art. 9 of the Constitution; Romania, art. 17, para. 2, of the Constitution; Rwanda, art. 16 of the Constitution; Saint Lucia, art. 1 of the Constitution; Sao Tome and Principe, art. 15(1) of the Constitution; Sierra Leone, art. 5 of the Constitution; Somalia, art. 6 of the 1979 Constitution; Spain, art. 14 of the Constitution; Sri Lanka, art. 12 of the Constitution; Sudan, art. 17(2) of the Constitution; Sweden, art. 16 of the Constitution; Switzerland, art. 4(2) of the Constitution, as amended in 1981; Suriname, s. 2(2) of the Constitutional Decree, cited above; Turkey, art. 10 of the Constitution; Trinidad and Tobago, art. 1 of the Constitution; Ukrainian SSR, art. 33 of the Constitution; Uruguay, art. 8 of the 1967 Constitution; USSR, art. 35 of the Constitution; Yugoslavia, art. 154 of the Constitution; Zaire, arts. 12 and 27 of the Constitution; Zambia, art. 13 of the Constitution; Zimbabwe, art. 11 of the Constitution.

<sup>81</sup> Antigua and Barbuda, s. C4(1) of the 1975 Labour Code; Byelorussian SSR, Preamble to the 1972 Labour Code and ss. 16 and 77 thereof; Burkina Faso, s. 1 of the Labour Code; Chile, s. 2 of the Labour Code; Comoros, s. 2 of the Labour Code; Cuba, s. 3(b) of the Labour Code, LS 1984-Cuba 1; France, s. L.123-1 to L.123-7 of the Labour Code; German Democratic Republic, s. 3 of the 1977 Labour Code, LS 1977-Ger.D.R.-1A; Haiti, s. 3 of the 1984 Labour Code, LS 1984-Hai. 1; New Zealand, s. 211 of the Industrial Relations Act 1987, cited above; Philippines, s. 133 of the Labour Code, LS 1974-Phi. 1; Romania, s. 2 of the Labour Code, LS 1972-Rum. 1; Somalia, s. 3 of the Labour Code, LS 1972-Som. 1; Swaziland, ss. 29 and 35 of the 1980 Employment Act; Ukrainian SSR, s. 22 of the Labour Code; USSR, ss. 9 and 17 of the Fundamental Principles governing the Labour Legislation of the USSR and the Union Republics, LS 1970-USSR 1.

measures<sup>82</sup> which deal with access to employment and, less frequently, access to occupation. The Committee of Experts has emphasised that legislation on non-discrimination between the sexes is an important step in a policy of equality of opportunity and treatment in employment and occupation.<sup>83</sup>

Civil and marital status, family situation, pregnancy and confinement

40. Many provisions respecting equality of opportunity and treatment refer only, as is the case of the Convention, to the grounds of sex, without providing a definition of what should be understood by discrimination on the basis of sex. In several countries, it is specified that discrimination on the basis of sex also includes acts of discrimination on the basis of civil status, marital status<sup>84</sup> or

<sup>82</sup> Australia, the 1984 Sex Discrimination Act; Austria, Equality of Treatment Act, of 23 February 1979, LS 1979-Aus. 1; Denmark, Act No. 161 of 12 April 1978 respecting equality of treatment as between men and women with regard to employment, LS 1978-Den. 3; Finland, Act No. 609 of 1986 respecting equality between men and women; Federal Republic of Germany, Act of 13 August 1980 respecting equality of treatment for men and women at the workplace, LS 1980-Ger.F.R. 3; Greece, Act No. 1414 of 30 January 1984 respecting the application of the principle of equality of the sexes in employment relationships, LS 1984-Gr. 1; Ireland, Act No. 16 of 1 June 1977 respecting equality in employment, LS 1977-Ire. 1; Iceland, Act No. 65 of 1985 on the Equal Status and Equal Rights of Women and Men; Italy, Act No. 903 of 9 December 1977, respecting equality of treatment between men and women in questions of employment, LS 1977-It. 1; Japan, Law No. 113 of 16 June 1972 respecting the improvement of the welfare of women workers including the guarantee of equal opportunity and treatment between men and women in employment, as amended on 1 June 1985, LS 1985-Jap. 1; Luxembourg, Act of 8 December 1981 respecting equal treatment for men and women, LS 1981-Lux. 1; Netherlands, Men and Women (Equal Treatment) Act, LS 1980-Neth. 2; Norway, Act No. 45 of June 1978 respecting equality between the sexes, LS 1978-Nor. 1; Portugal, Legislative Decree No. 392/79 of 20 September 1979 to guarantee equality of opportunity and treatment for men and women in matters of work and employment, LS 1979-Por. 3; Sweden, Act of 17 December 1979 respecting equality between women and men at work, LS 1979-Swe. 2; United Kingdom, the 1975 Act, cited above.

<sup>83</sup> RCE 1987, p. 360.

<sup>84</sup> Argentina, s. 172 of the Act respecting contracts of employment, LS 1976-Arg. 1 (covers modifications of civil status during the employment relationship); Costa Rica, s. 1 of Act No. 2694, cited above; Equatorial Guinea, art. 3 of the Constitution; Haiti, art. 35 of the 1987 Constitution; Italy, Act No. 903 of 9 December 1977; Philippines, s. 136 of the Labour Code, forbidding acts of discrimination on the basis of a woman's marriage; Swaziland, ss. 29 (footnote continued on next page)

family status, pregnancy or confinement.<sup>85</sup> The term "marital status", due to its reference to marriage, may leave a number of doubts concerning the scope of this ground of illegal discrimination. A number of provisions indicate that the expression "marital status" refers to the status or situation of a person who is single, married, married but living separately and apart from the spouse, divorced, widowed or the de facto spouse of another person.<sup>86</sup> In order to avoid any doubts in this matter, some legislative provisions include references to marital status and to family ties other than marriage. Some laws qualify acts of discrimination on the basis of marital or family status as acts of indirect discrimination or mention them as illustrations of acts of indirect discrimination.<sup>87</sup>

41. The discriminatory nature of distinctions on the basis of pregnancy, confinement and related medical conditions<sup>88</sup> is demonstrated by the fact that up to the present time they have only

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and 39 of the 1980 Employment Act; United Kingdom, s. 3 of the 1975 Act, cited above; United States, Alaska, s. 18.80.200(a) of the Human Rights Act, forbidding discrimination on grounds of a change in marital status.

<sup>85</sup> Canada, Canadian Human Rights Act, s. 3(2) "where the ground of distinction is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex"; United States, Civil Rights Act of 1964, s. 701(k); the expressions "because of sex" or "on the basis of sex", include but are not limited to pregnancy, childbirth, or related medical conditions; see also Connecticut, Human Rights and Opportunities Act, s. 46a-51(17), which adds to the list of examples of discrimination on grounds of sex, child-bearing capacity, sterilisation and fertility; Michigan, Civil Rights Act, Art. 2, s. 201(d), which specifies that medical conditions related to pregnancy and childbirth do not include non-therapeutic abortions not intended to save the life of the mother. See in this respect, France: Court of Cassation (Social Chamber) (8 June 1983, Bull. V, No. 308, p. 219), which found that the dismissal of a woman employee who had undergone a voluntary termination of pregnancy was illegal since the employer could not sanction through dismissal the exercise of the right held by the woman employee under the Act of 17 January 1975 authorising voluntary terminations of pregnancy.

<sup>86</sup> Australia, 1984 Act, cited above, s. 4; see also Victoria, Equal Opportunity Act 1984.

<sup>87</sup> Luxembourg, Act of 8 December 1981, cited above, s. 2(1); the Government of Costa Rica indicated in the report it transmitted under Article 22 for the period ending June 1986, that in job vacancy advertisements a certain latent degree of conscious or unconscious discrimination can be identified based particularly on civil status in suggestions, for example, that a greater degree of responsibility is demonstrated by married persons or that there are fewer family problems in the case of single persons.

<sup>88</sup> In so far as they do not constitute protective measures in the sense of Article 5 of the Convention; see below, Chapter III, Section 3 (Maternity protection).



affected women. The situations linked to civil status, in contrast to those related to pregnancy and confinement, are not in themselves discriminatory. They may amount to unjustifiable grounds irrespective of the sex of the person affected, as illustrated in cases where a celibacy clause is imposed on all employees. The basis of the discrimination lies less in the marital status of the individual than on the fact that certain requirements (celibacy, marriage, etc.) are imposed only on individuals of one sex. The Committee of Experts considers that distinctions based on civil status are discriminatory by nature under the terms of the Convention to the extent that they result in a requirement or condition being imposed on an individual of a particular sex that would not be imposed on an individual of the other sex. The same applies in cases of requirements or conditions that are imposed equally on persons of both sexes, such as requirements concerning height or weight which are the same for both men and women, but are such that the percentage of persons able to fulfil those conditions differs widely according to their sex.

42. Since the previous General Survey, the Committee of Experts has noted with satisfaction that in several countries' provisions, which when applied gave rise to discrimination on the basis of marital or family status, have been repealed. In the Central African Republic, the Government stated that the Decree of 17 January 1981 issuing the special conditions of service of the Central African Police Force had repealed the provision of a Decree of 1968 which prohibited women police officers from marrying and which made pregnancy grounds for terminating the employment relationship.<sup>89</sup> In Malta, Act No. XI of 1981 amended the Conditions of Employment (Regulation) Act of 1952 so as to protect women workers against decisions to terminate their employment on the basis of marriage or maternity.<sup>90</sup> The Committee of Experts also noted that the Swiss Federal Act of 28 June 1972 amended the provisions of the Act of 1927 on the conditions of employment of the civil service concerning termination of employment in the event of the marriage of women public servants; an Ordinance, dated 20 December 1972, also repealed the clause in the regulations for employees concerning the termination of employment of women in the event of marriage.<sup>91</sup> The Committee of Experts has also noted with satisfaction that in Spain, section (2)(3) of the Decree of 20 August 1970, making a married woman's acceptance of employment subject to permission from her husband, was repealed by Act No. 16 of 8 April 1976 on labour relations. Section (10)(2) of this Act specifies that all women, regardless of civil status, can enter into contracts of employment of any kind and exercise, in the same way as men, all rights in relation to their professional activity.<sup>92</sup>

<sup>89</sup> RCE 1987, pp. 357-8.

<sup>90</sup> RCE 1982, p. 201.

<sup>91</sup> Switzerland, RCE 1973, pp. 179-80, and 1975, p. 167.

<sup>92</sup> RCE 1977, p. 233. For similar provisions see: Cape Verde, s. 17 of Legislative Decree No. 58/81 enacting the Family Code, under which each spouse has full freedom to choose and exercise his or her vocation and occupational activity; Switzerland: s. 167 of the Swiss (footnote continued on next page)



43. A number of provisions respecting civil status and maternity however remain in force both in countries that have ratified the Convention and in countries that have not yet ratified it.<sup>93</sup> In its reply to the questionnaire of the Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation concerning the Status of Teachers,<sup>94</sup> one government indicated that married women may be recruited into the educational service and that a female teacher may continue her employment after marriage. Nevertheless, if the Minister of Education should consider that the number of candidates fulfilling the conditions required by the educational service exceeds the demand, he or she may give instructions for priority to be given in recruitment to men, unmarried women and women who are heads of families. Furthermore, in the event of staff reductions, the Minister may give instructions that, on the decision of the Head of State, a fixed number or proportion of female married teachers (but not heads of families) may be excluded from the educational service. In Zaire a provision of the public service regulations obliges married women to obtain written authorisation from their spouse in order to be employed in the public service.<sup>95</sup> In Ecuador, the regulations respecting co-operative societies provide that married women must obtain authorisation from their husbands in order to become members of co-operatives.<sup>96</sup> In Brazil, the husband or parent shall be entitled

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Civil Code, which came into force on 1 January 1988, which abolishes the need for the husband's consent for the employment of a married woman, and lays down that in the choice of occupation or source of maintenance, and in the exercise of their activities, each spouse shall take into consideration the other spouse and the interests of their conjugal union.

<sup>93</sup> Austria: the Government indicated that discussions are under way concerning an amendment to s. 31.1. of the Act of 13 July 1922 respecting actors' contracts, which authorises termination of the contract in the event of the marriage of an actress; Barbados: the Government indicated its intention of amending s. 8 1(c) of the Public Employees Pensions Act, under which a woman public servant may be obliged to leave the public service in the event of her marriage; Rwanda: in accordance with s. 122 of the Civil Code, married women have to obtain the authorisation of their husbands for any legal action in which they need to make a personal appearance; Trinidad and Tobago: s. 57 of the Public Service Commission Regulations (Subsidiary Legislation, Chapter 1:01), s. 52 of the Police Service Commission Regulations (Subsidiary Legislation, Chapter 1:01) and s. 58 of the Statutory Authorities' Service Commission Regulations (Subsidiary Legislation, Chapter 24:01) under which the Public Service Commission may terminate the appointment of a female officer who is married, on the grounds that her family obligations are affecting the efficient performance of her duties.

<sup>94</sup> CEART/IV/1982/1 (Papua New Guinea), reply to question A.2.4.

<sup>95</sup> Public Service Regulations, s. 8(8).

<sup>96</sup> S. 17(b) of the General Regulations issued under the Co-operative Societies Act.

to bring an action for the cancellation of a contract of employment if the continuance thereof would constitute a threat to family ties or would be manifestly dangerous to the woman on account of her special situation.<sup>97</sup>

44. A number of countries reported that protection against discrimination on the basis of sex also includes acts of indirect discrimination.<sup>98</sup> The definitions given to acts of indirect discrimination are not uniform and are generally of an illustrative nature. In certain provisions, the indirect nature of discrimination stems from the fact that the sex of the individual is not the direct basis of discrimination, although it is based indirectly on grounds such as, marital status, maternity, pregnancy, etc.<sup>99</sup> In other cases, the indirect nature of discrimination refers not to its grounds, but to the circumstances in which it originates. Discrimination occurring through pre-selection systems or job offers are regarded as indirect discrimination in Italy.<sup>100</sup> In some countries the expression "indirect discrimination" is not mentioned in the legislation, which, however, prohibits certain practices that could be defined as forms of indirect discrimination. In the United Kingdom, the law lays down that any person imposing a requirement or condition upon women that is equally required of men, but that is such that the proportion of women able to fulfil it is considerably smaller than the proportion of men who are able to do so, commits a discriminatory act under the law.<sup>101</sup> Certain requirements that appear to be neutral and which apply equally to both sexes also constitute indirect discrimination: this is the case with requirements concerning age, minimum height and weight.<sup>102</sup> One government indicated in its report<sup>103</sup> that regulations establishing a minimum height or weight for certain categories of employees have been found to be discriminatory since their application would lead

<sup>97</sup> Consolidation of Labour Laws, s. 446.

<sup>98</sup> See, for example, Canada, Canadian Human Rights Act, s. 7.

<sup>99</sup> Belgium, Economic Reform Act, dated 4 August 1978, s. 118 (marital and family status), LS 1978-Bel. 2; Denmark, Act No. 161 of 12 April 1978, cited above, s. 1(1) (pregnancy, civil and family status); Guinea-Bissau, s. 155 of the 1986 Labour Code (civil and family status); Portugal, Legislative Decree No. 392/79, of 20 September 1979, cited above, s. 3 (civil status or family situation); Netherlands, Act of 1 March 1980 cited above, s. 1 (family or marital situation); see also Directive 76/207/EEC, of 9 February 1976, adopted by the Council of Ministers of the European Communities, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, s. 2(1) (marital or family status), O.J.E.C., No. L 39 of 14/2/1976.

<sup>100</sup> Act No. 903 of 9 December 1977, cited above, s. 1(2).

<sup>101</sup> 1975 Act, cited above, s. 1(1)(b)(i).

<sup>102</sup> *ibid.*, s. 5(2).

<sup>103</sup> United States: Several state laws specifically prohibit discrimination on the basis of height and weight, even when such discrimination is not related to sex.

to the exclusion of approximately 40 per cent of the female population. The authority responsible for setting these requirements was not able to demonstrate that minimum weight and height were related to the satisfactory performance of the work.

### Sexual harassment

45. Some governments and employers' and workers' organisations have turned their attention to one particular form of discrimination on the basis of sex, namely the types of behaviour covered by the terms "sexual harassment" or "unsolicited sexual attention".<sup>104</sup> These include insults, remarks, jokes, insinuations and inappropriate comments on a person's dress, physique, age, family situation, etc.; a condescending or paternalistic attitude undermining dignity; unwelcome invitations or requests that are implicit or explicit, whether or not accompanied by threats; lascivious looks or other gestures associated with sexuality; unnecessary physical contact, such as touching, caresses, pinching or assault. In order to be qualified as sexual harassment, an act of this type must, in addition, show one of the following characteristics: be justly perceived as a condition of employment or a precondition for employment; influence decisions taken in this field, or prejudice occupational performance; humiliate, insult or intimidate the person suffering from such acts. Any act, the unwanted nature of which could not be mistaken by its author, shall be deemed sexual harassment. Sexual harassment is a potential threat to workers and the enterprise. Not only does it bring into question individual integrity and the well-being of workers, but it is also contrary to the objectives of the employer since it weakens the bases upon which industrial relations are built and hinders productivity. A survey conducted in 1983 in Canada revealed that many persons had been subject to unwanted sexual attention at the workplace or in service sectors: on the order of 1,200,000 women and 300,000 men considered that they had been sexually harassed at some time during their occupational life;<sup>105</sup> young women, unmarried women and women belonging to a household where the income was below average had stated more frequently than other categories that they had been sexually harassed. A survey conducted in the same year in Peru, in an industrial setting (fish conserving),

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<sup>104</sup> In 1985 the International Labour Conference adopted a resolution on equal opportunities and equal treatment for men and women in employment which states that "sexual harassment at the workplace is detrimental to employee's working conditions and to employment and promotion prospects. Policies for the advancement of equality should therefore include measures to combat and prevent sexual harassment", ILO, Official Bulletin, Vol. LXVIII, 1985, Series A, p. 91. On the consequences of sexual harassment on employment security in developing countries, see also, R. Anker and C. Hain, Sex Inequalities in Urban Employment in the Third World, ILO, Geneva, 1986, pp. 13-14.

<sup>105</sup> Canadian Human Rights Commission, Unwanted Sexual Attention and Sexual Harassment - Results of a Survey of Canadians, March 1983.

demonstrates the difficulties involved in obtaining information on this subject, which "belongs to the world of silence and fear, even though it is an ever-present and hidden threat to security [of employment] and to the reputation of the women who have been the subject of sexual advances".<sup>106</sup> Although the information compiled is unpleasant, this type of survey should be encouraged since it would appear that recognition of the existence of this phenomenon plays an important role in its elimination. This is one of the conclusions of a seminar on "Women and the Law", held in Malaysia; another proposal to come out of the seminar is that, until services are introduced in order to deal with these questions and adequate provisions are adopted, cases of sexual harassment should be pursued in the courts under terms that already exist such as "assault", "affront to one's honour" and "rape" within the meaning of the Penal Code.<sup>107</sup> The difficulty of using the provisions of penal legislation lies in how to prove this type of act.

46. In several countries legislative provisions have been adopted in this connection or are in the process of adoption. In Australia, one of the objectives of the Sex Discrimination Act is to eliminate, in so far as possible, discrimination involving sexual harassment in the workplace and in teaching institutions. The Act gives a definition of the types of conduct considered to constitute sexual harassment.<sup>108</sup> In Canada, sexual harassment is deemed to be harassment on the basis of an illegal distinction, constituting a discriminatory act.<sup>109</sup> A general prohibition of sexual harassment is laid down in the Labour Code,<sup>110</sup> which gives the following definition: any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by any employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion. The Code also lays down the right of every employee to employment free of sexual harassment and imposes a duty on every employer to make reasonable efforts to maintain that right. In the United States, the legislation of several states also prohibits sexual harassment, which is deemed by some laws

<sup>106</sup> M. Barrig, M. Chueca, A.M. Yáñez: "Anzuelo sin carnada. Obreras en la industria de conserva de pescado", Lima, 1984, p. 39; the authors report that this phenomenon generally involves men in a position of authority in the enterprise and that it also affects office jobs as well as industrial jobs. In order to explain the silence surrounding occurrences of "unsolicited sexual advances", the women who are the victims put forward arguments such as the need to keep jobs, the conviction of being unable to oppose a superior, distrust and fear of the scorn of one's colleagues.

<sup>107</sup> Women and Employment in Malaysia; a report presented by the Federation of Women Lawyers, Women and the Law, Kuala Lumpur, 1983.

<sup>108</sup> 1984 Act, cited above, ss. 3(c), 28 and 29.

<sup>109</sup> Canadian Human Rights Act, s. 13.1; see also Ontario, Human Rights Act, ss. 4(2), 6(3)(a) and 9(f) and Quebec, Charter of Rights and Freedoms.

<sup>110</sup> Canadian Labour Code, s. 61(7) et seq.

to be a violation of civil rights.<sup>111</sup> In 1980, the Equal Employment Opportunity Commission adopted guide-lines on sexual harassment indicating that such behaviour constituted a violation of section 703 of Title VII of the Civil Rights Act of 1964 and defining the responsibilities of employers in regard to its prevention, which was considered to be the best instrument for eliminating this type of behaviour.<sup>112</sup> In New Zealand, the Human Rights Commission has adopted an analogous solution by assimilating sexual harassment to discrimination on the basis of sex.<sup>113</sup> In Peru, the law defines as hostile acts by the employer or his or her representatives acts which are contrary to morality, sexual harassment and any acts representing dishonest behaviour affecting the dignity of the worker.<sup>114</sup> In Israel, the new Law on equality of opportunity between men and women contains a provision forbidding sexual harassment. In the Philippines, the National Commission on Women proposed that studies be undertaken in order to define the elements constituting work-related sexual harassment with the aim of amending legislation in this area.<sup>115</sup> In Finland, the Equality Ombudsman must submit a report to Parliament which shall, inter alia, publicise the protection afforded to women against sexual harassment. In Sweden, the Ombudsman has requested that the legislation respecting equal opportunities be amended so that it may apply directly to cases of sexual harassment and has commissioned a study on this matter.<sup>116</sup>

## D. Religion

47. The Convention aims to provide protection against discrimination, on the basis of religion, affecting employment and occupation, which is often the consequence of a lack of religious freedom or of intolerance, and in some cases of the existence of a State religion. It is therefore necessary to examine the general provisions adopted for the elimination of forms of intolerance and discrimination based on religion or belief and their effects on the

<sup>111</sup> California, Fair Employment and Housing Act, s. 12940(3); Connecticut, Human Rights and Opportunities Act, s. 46a60(8); Illinois, Illinois Human Rights Act, ss. 1-102(A) and 2-101(E); Michigan, Civil Rights Act, Art. 1, s. 102(2); Minnesota, Human Rights Act, s. 363-01(10a); Wisconsin, Fair Employment Act, ss. 111.32(13) and 111.36(1)(b).

<sup>112</sup> Equal Employment Opportunity Commission, 29 CFR Part 1604.11.

<sup>113</sup> The Human Rights Commission expressly referred to discrimination on the basis of sex as defined in s. 15 of the Human Rights Commission Act No. 49 of 1977. See also ss. 212 and 222 of Industrial Relations Act 1987.

<sup>114</sup> Act No. 25514 of 31 May 1986 governing Employment Security, s. 25(h).

<sup>115</sup> National Commission on Women, National Consultation on Women, Law, Policy and Action, Baguio City, 20-22 March 1987, Workshop on Labour and Employment Report.

<sup>116</sup> CEDAW/C/13/Add. 6, pp. 23 and 150.

application of the Convention. Religious considerations as the basis of distinctions in occupational life may vary in nature. The Committee of Experts already noted in a previous General Survey<sup>117</sup> a number of situations that may lead to discrimination. In the first place, one type of problem lies in the coexistence of communities of different religions which may give rise to similar problems to those encountered in multi-racial or multi-national communities. In other cases, discriminatory acts in employment derive more specifically from an attitude of intolerance towards persons who profess a particular religion or particular religious beliefs, or who profess no religion. The Committee noted that where religious considerations hold a large place in public and social life, and in particular where one religion has been established as the religion of the State, care has to be taken that this will not lead to consequences as regards employment and occupation.<sup>118</sup> The available information illustrates that other issues have been added to the problems already considered by the Committee. The constraints of a trade or an occupation may in certain circumstances hinder the free exercise of a religious practice. This may happen in cases where a religion prohibits work on a day different from the day of rest established by law or from the day on which the enterprise is closed, or in cases where the exercise of a religion requires a particular kind of clothing. This issue affects both the right to exercise one's own faith or creed and also the right to act in accordance with it. Another question arises with regard to oaths taken when taking up a specific job, position or type of employment. Finally, the question also arises as to whether religion can constitute a qualification that may be required in good faith for the exercise of a job or an occupation. This last question will be dealt with in greater detail in the section concerning the qualifications required for a particular job or occupation.<sup>119</sup>

48. A large number of constitutional provisions and fundamental laws give statutory effect to the principle of non-discrimination on grounds of religious attitudes.<sup>120</sup> A number of provisions make

<sup>117</sup> RCE 1963, para. 25.

<sup>118</sup> *idem.*

<sup>119</sup> See below, Chapter III, Section 1.

<sup>120</sup> Equality before the law without distinction on grounds of religion: Angola, art. 18 of the Constitution; Cape Verde, art. 22 of the Constitution (religious belief and philosophical conviction); Egypt, art. 40; Ecuador, art. 19(5); German Democratic Republic, art. 20(1) of the Constitution; Federal Republic of Germany, art. 3 of the Constitution; Guinea-Bissau, art. 13 of the Constitution (religious belief and philosophical conviction); Italy, art. 3 of the Constitution; Libyan Arab Jamahiriya, art. 2 of the 1969 Constitution; Madagascar, art. 12 (religious belief); Mali, art. 1 of the Constitution; Mauritius, art. 16 of the Constitution; Netherlands, art. 1 of the Constitution (religion and belief); Portugal, art. 13 of the Constitution; Rwanda, art. 16 of the Constitution; Somalia, art. 6 of the Constitution; Thailand, art. 4 of the 1978 Constitution; Turkey, art. 10 of the Constitution; USSR, art. 34 of the Constitution; Yugoslavia, art. 154 of the Constitution.

reference to freedom of religion, freedom of conscience, freedom of thought and belief.<sup>121</sup> In some countries, the constitutional provisions authorise the practice of a number of religions, which are referred to by name, which could be interpreted as a prohibition on believing or practising a religion, the exercise of which is not guaranteed by the Constitution, or as a prohibition of atheism.<sup>122</sup> Problems may arise with regard to access to certain areas of employment in countries that recognise one religion as the State religion<sup>123</sup> and in countries founded on a doctrine implying atheism. Generally provisions that recognise a religion are supplemented by a prohibition of discrimination on grounds of religion or by a statement of the principle of the equality of citizens before the law without distinction on the basis of religion.<sup>124</sup> In other

<sup>121</sup> Freedom of religion, of conscience\*, of thought\*\* and of belief\*\*\*: Barbados, art. 19 (\*\*); Burundi, art. 16; Belize, art. 13(b) of the legislation concerning the protection of fundamental rights and freedoms; Cameroon, Preamble; Chile, art. 19(6)(\*); Congo, art. 18; China, art. 36; Colombia, art. 53(\*); Czechoslovakia, art. 32(1); Ecuador, art. 6; Finland, art. 9(\*); German Democratic Republic, arts. 20(1) and 39(1)(\*)(\*\*\*); Federal Republic of Germany, art. 3(\*)(\*\*); Guatemala, art. 36 (\*\*\*); Guyana, s. 40(1); Honduras, art. 77; Iraq, art. 25; Italy, art. 3(\*)(\*\*); Mali, art. 6; Mauritius, art. 11; Nepal, art. 14; Netherlands, s. 6; Pakistan, art. 26(1); Peru, art. 2; Portugal, art. 60(\*); Qatar, art. 9(\*)(\*\*); Rwanda, art. 18(\*); Seychelles, Preamble; Solomon Islands, art. 11(\*); Spain, art. 16(\*\*); Sweden, art. 1(6); Suriname, art. 7; Syrian Arab Republic, art. 35(\*)(\*\*); Thailand, art. 25; Trinidad and Tobago, art. 4(h)(\*)(\*\*); Turkey, arts. 14 and 15(2)(\*); Venezuela, art. 65; Vanuatu, art. 5(1) (religion or traditional beliefs); Zaire, art. 27(2); Zambia, s. 21(\*\*); Freedom of conscience and belief(\*): Bahamas, art. 22; Byelorussian SSR, art. 50; Brazil, art. 153, para. 5; Bulgaria, art. 35(2)(\*); Dominican Republic, art. 8(8); Freedom of belief: Switzerland, art. 49.

<sup>122</sup> Islamic Republic of Iran, art. 12 of the Constitution: "The official religion of Iran is Islam and the sect followed is Jafari Shi'ism ..." and art. 13 "The Iranian Zoroastrians, Jews and Christians are the only recognised minorities, who, within the limits of the law, are free to perform their own religious rites, and who, in matters relating to their own personal affairs and teachings may act in accordance with their religious regulations ...".

<sup>123</sup> Recognition of a religion by the Constitution or a Basic Act: Algeria, art. 2; Argentina, art. 2; Bahrain, arts. 2 and 18; Bolivia, arts. 3 and 6; Costa Rica, art. 76; Islamic Republic of Iran, art. 13; Kuwait, arts. 2 and 29; Mauritania, art. 2; Morocco, art. 6; Paraguay, art. 6; Qatar, art. 1; Syrian Arab Republic, art. 3; on this point see Abdullahi A. An-Na'im, Religious Minorities under Islamic Law and the Limits of Cultural Relativism, Human Rights Quarterly, February 1987, Vol. 9, No. 1.

<sup>124</sup> Algeria, art. 2; Argentina, art. 2; Bolivia, art. 7; Mauritania, art. 2; Qatar, art. 9.



countries, the Constitution prohibits the adoption of laws concerning the establishment of a particular religion or forbidding the exercise of any religion.<sup>125</sup> In some countries constitutional provisions or labour laws give more specific guarantees concerning the right to work and to satisfactory conditions of work without discrimination on the basis of religion or belief<sup>126</sup> or provide that an individual shall not be prevented from entering public employment on grounds of religion or belief.<sup>127</sup> In a number of countries, the penal legislation contains provisions prohibiting and punishing the refusal of a service or a right to an individual or a group on the basis of their religion or belief, or incitement to others to commit such acts.<sup>128</sup> The same applies to labour codes and legislation applying specifically to the world of work.<sup>129</sup> In some countries, collective agreements also include these guarantees.<sup>130</sup>

49. The large number of constitutional, legislative and contractual provisions providing protection against discrimination on the basis of religion or guaranteeing freedom of religion, conscience, thought and belief should not be allowed to obscure the difficulties which may arise with regard to their application. The Special Rapporteur to the Commission on Human Rights of the UN Economic and Social Council has noted that, "The existence, both necessary and desirable, in Constitutions or other texts of national legislation of provisions establishing the principle of freedom of religion and belief does not, however, constitute an absolute guarantee of respect for this principle, and there are unfortunately many instances of

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<sup>125</sup> Australia, art. 116. The Supreme Court in the case Adelaide Company 5f Jehovah's Witnesses Incorporated v. Commonwealth ((1943), 67 C.L.R 116) indicated that the prohibition enshrined in art. 116 protects not only the free exercise of any religion, but also the freedom not to have a religion.

<sup>126</sup> Argentina; Cape Verde; German Democratic Republic; USSR.

<sup>127</sup> Cape Verde; Denmark; Finland; Spain.

<sup>128</sup> France, ss. 187-1 and 416 of the Penal Code; Madagascar, s. 115 of the Penal Code; Sweden, s. 9 of the Penal Code.

<sup>129</sup> Algeria, s. 2 of the Act to make general provision for workers' conditions of employment, LS 1978-Alg. 1; Argentina, ss. 17 and 73 of the Act respecting employment contracts; Cuba, s. 3(b) of the 1984 Labour Code; United States, Ohio, Religious Discrimination Guide-lines of 13 November 1973, s. 3; Ethiopia, ss. 107 and 115 of Proclamation No. 64 on Employment; New Zealand, ss. 15, 19, 21, 22 and 26 of the Human Rights Commission Act, 1977, No. 49 and s. 211 of the Labour Relations Act 1987; United Kingdom, s. 30 of the Education Act of 1944 which lays down that a teacher shall not be deprived of, or disqualified for, any promotion or other advantage by reason of his religious opinions; Swaziland, ss. 29 and 35 of the 1980 Employment Act.

<sup>130</sup> Togo, s. 5 of the Inter-occupational Agreement of Togo, of 1 May 1978.



persecution or other manifestations of religious intolerance, despite the adoption of such legislative provisions."<sup>131</sup>

50. The Committee of Experts has had occasion to express its profound concern at the discrimination in employment, occupation and training practised in respect of persons belonging to the Baha'i community, the free-masons and organisations whose constitutions imply atheism in the Islamic Republic of Iran.<sup>132</sup> Discrimination of this type affects access to employment and training and conditions of employment. In practical terms it means the termination of employment in the public sector<sup>133</sup> and in the private sector, with the Government requiring employers to dismiss the employees concerned; it also means prohibition to register in schools, higher education institutes and universities and exclusion from these institutions. Retired public officials have had their pensions withdrawn because of their adhesion to their faith and some public officials have had to reimburse the State the amount of salaries that they had received during their careers as officials. Such discriminatory acts cease to apply if the members of these groups renounce their faith and publically give allegiance to the faith professed by the majority. In Pakistan, an Ordinance amending the Penal Code prohibits the followers of a certain sect from having access to education and public employment.<sup>134</sup> Students belonging to this sect may be expelled from

<sup>131</sup> Economic and Social Council, Commission on Human Rights, 43rd session, Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, submitted by Mr. Angelo Vidal d'Almeida Ribero, Special Rapporteur appointed in accordance with resolution 1986/20 of the Commission on Human Rights, E/CN.4/1987/35, para. 30.

<sup>132</sup> RCE 1983, p. 221; 1984, pp. 263-265; 1985, pp. 290-291; 1986, pp. 272-273; 1987, pp. 367-370. On the general situation of the Baha'i community in Iran see also the Report of the Secretary-General of the United Nations to the Commission on Human Rights at its 38th session (E/CN.4/1517), Provisional Report of the Special Representative of the Commission on Human Rights of the United Nations appointed to study the situation with regard to human rights in the Islamic Republic of Iran, Report on the Human Rights Situation (A/40/874).

<sup>133</sup> In accordance with s. 8, para. 29, of the Act respecting the re-organisation of human resources in ministries and other governmental or government-related bodies, adopted on 27 September 1981 (5/7/1,360) by the Parliament, lifelong banning from employment shall be the penalty for those belonging to the "misguided Bahai'i group" and for members of organisations whose constitutions imply atheism. Some individual dismissals of Bahai'is are also based on the fact that they do not belong to one of the four recognised religions under arts. 12 and 13 of the Constitution and to maintain their services would be contrary to the Constitution (see RCE 1987, pp. 367-370).

<sup>134</sup> Ordinance No. XX of 1984 respecting the prohibition and repression of the anti-Islamic activities of the Qadiani group, the Lahori group and the Ahmadis.

university. In Egypt, a Presidential order forbids any person who is convinced that he or she adheres to principles that are contrary, or that are a threat, to divine laws, from holding high office in the public administration or the public sector, from publishing articles in periodicals, or from exercising an activity in any information media or engaging in any other work that may influence public opinion.<sup>135</sup> In other countries, religious movements and sects have been prohibited by the authorities and their members made liable to penal sanctions as a direct result of their membership.<sup>136</sup> The consequences of these prohibitions of religious movements or sects on employment and occupation need close examination in order to determine whether in practice they result in the types of discrimination covered by the Convention.

51. In the great majority of cases, discrimination on the basis of religion is not of an institutionalised nature. In a number of cases particularly arduous and heavy work may be reserved for members in a religious minority; in other cases membership in a religious community may affect promotion opportunities and social and occupational success. Finally, in some cases, even the possibility of finding a job is compromised on grounds of religion, even though constitutional texts guarantee equality or forbid discrimination on the basis of religion.<sup>137</sup>

52. The protection afforded by the Convention with regard to equality of opportunity and treatment without discrimination on the basis of religion would be void of substance if it did not include all the aspects equally, or at the very least, the most important aspects of religious practice. In a country that has not ratified the Convention, the provisions forbidding discrimination, particularly in employment, have been amended as follows: "The term "religion"

<sup>135</sup> Presidential Order No. 214 of 1978, first principle.

<sup>136</sup> For example, in Malawi, the activities of groups such as the Jehovah's Witnesses (Watch Tower), also known under various names such as Acitawala, Ampatuko, Mboni and Achoonadi, have been declared illegal in accordance with the provisions of s. 64(2)(ii) of the Penal Code.

<sup>137</sup> United Kingdom: A survey commissioned by the Standing Advisory Commission on Human Rights on employment trends in Ulster between 1971 and 1985, published in October 1987, found that only a very small minority of employers had adopted any equal opportunity measure other than signing a declaration of principle and intent. Over ten years after the establishment of the Fair Employment Agency, less than 10 per cent of the workforce has been monitored and only one in five enterprises have reviewed their recruitment practices. The unemployment rate for Catholics is two-and-a-half times as high as for Protestants, with factors such as education and socio-economic group accounting for only a small part of the differential. The authors concluded that religion was the determining factor in the unemployment rate. A number of measures have been proposed in order to resolve this situation; Standing Advisory Commission on Human Rights, Religious and Political Discrimination and Equality of Opportunity in Northern Ireland, Report on Fair Employment, London 1987.

includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>138</sup> In the Netherlands, the Sunday Observance Act contains provisions ensuring that there are no impediments to the observance of Sunday and certain Christian holidays, although there is no regulation respecting non-Christian days of rest and holidays. The Supreme Court ruled that while non-Christian religious holidays could not be regarded as equivalent to those in the Christian calendar, it would be unreasonable for an employer to demand the presence of an employee at work if the latter had given notice sufficiently in advance for requesting a day's holiday in order to celebrate a religious holiday that was important to him or her, unless the work of the enterprise would be seriously disrupted.<sup>139</sup> In another country the Supreme Court has ruled that the Sunday Act, which made Sunday a day of rest, was null and void since it violated the right to freedom of religion.<sup>140</sup> One of the principal objectives of the recommendations made by bodies responsible for implementing non-discrimination policy and policy respecting religious minorities is to ensure that the members of these minorities enjoy in practice the same opportunities to celebrate their religious holidays as traditional Christians. Furthermore, the Supreme Court found that the Canadian Human Rights Act prohibits both discrimination based directly on religion and also systemic or de facto discrimination, that is unfavourable treatment affecting a person due to a characteristic associated with religion, such as being unable to

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<sup>138</sup> United States, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, s. 701(j), LS 1972-USA 1; these provisions have been taken up in national legislation in the following States: California, Fair Employment and Housing Act, s. 12926(i); Connecticut, Human Rights and Opportunities Act, s. 46a-51(18); Illinois, Illinois Human Rights Act, ss. 1-102(N) and 2-101(F). S. 955.1(a) of the Pennsylvania Human Relations Act lays down that it shall be an unlawful discriminatory practice for any officer of the State if the observance of any particular day such as the sabbath or another holy day is taken into consideration in hiring or retaining a person in state employment; furthermore, persons employed by the State who take time during their working hours for the observance of their religious practices may make up these absences by an equivalent amount of time. Reference should also be made to the guide-lines adopted by the Equal Employment Opportunity Commission, as amended in 1967 (Guidelines No. 1605.1 on Discrimination because of Religion), 31 Federal Register, pp. 8370 et seq. (1966).

<sup>139</sup> Report submitted to the Secretary-General of the United Nations on the implementation of resolution 1985/51 of the Commission on Human Rights, the Government's reply, para. 16 (E/CN.4/1986/37/Add. 5).

<sup>140</sup> Canada: R. v. Big M Drug Mart Ltd., No. 18/125, 24 April 1985.

work on the sabbath.<sup>141</sup> The Government also referred to the decision of the Inquiries Office of a Province in favour of three persons belonging to the Sikh religion to whom employment had been refused because they were bearded and wore turbans; the Office decided that they had been the victims of discrimination on the basis of their religious faith.<sup>142</sup> In the Syrian Arab Republic, state employees have recently obtained the right to a period of pilgrimage leave during their career.<sup>143</sup>

53. In a number of countries, access to public employment or to a particular occupation may be subject to a statement or an oath using terms that expressly refer to a particular religion or the content of which is contrary to the religious beliefs of the applicants. In the Federal Republic of Germany, an administrative tribunal confirmed the rejection of an applicant for employment in the preparatory teaching service who had refused on religious grounds to sign a prepared statement regarding her loyalty to the Constitution, although she was prepared to give assurances in a different form that she would fulfil her functions in accordance with the provisions of the Constitution of the State respecting education. The tribunal indicated that there was no reason to suppose that the applicant was opposed to the free democratic basic order in the sense of the Constitution, but it confirmed her rejection on the grounds that the Federal Constitutional Court had ruled that the State should be able to rely on a body of officials of unconditional loyalty for the execution of its tasks.<sup>144</sup> In Finland, section 9 of the Freedom of Religion Act used to provide that a person who is not a member of a religious community or whose religious denomination does not permit the swearing of oaths, shall give a declaration on his honour and conscience. The Government has indicated that in practice, the obligation to give a religious oath applies to the majority of citizens, since more than 90 per cent of the population are members of a religious community which accepts the concept of an oath. These provisions have been amended.<sup>145</sup> In Belize, article 11(4) of the Constitution provides that a person shall not be compelled to take any oath that is contrary to his religion or belief or to take any oath in a way that is contrary to his religion or belief. A similar provision is included in the Constitution of Mauritius.<sup>146</sup>

<sup>141</sup> Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.

<sup>142</sup> N.S. Gill v. Prestige Cab, Kang v. Prestige Cab, Pannu v. Prestige Cab, Inquiries Office of Alberta, 10 December 1986.

<sup>143</sup> Act of 1985 issuing regulations governing the public service, s. 56; the Act grants 30 days' pilgrimage leave for Muslims and seven days for Catholics. The Committee of Experts has requested the Government to indicate the reasons for which different measures had been adopted according to the religion of the state employee.

<sup>144</sup> Administrative Tribunal of Freiburg, 18 June 1981.

<sup>145</sup> Report of the Secretary-General pursuant to Commission on Human Rights Resolution 1985/51, the Government's reply, para. 38 (E/CN.4/1988/43).

<sup>146</sup> Constitution, Chapter II, art. 11(4).

## E. Social origin

54. During the preparatory work of the Convention, social origin was mainly envisaged in terms of social mobility, defined as the possibility for an individual to pass from one class or social category to another. The problem of discrimination on the basis of social origin arises when an individual's membership in a class, a socio-occupational category or a caste determines his or her occupational future either by denying him or her certain jobs or activities or, on the contrary, by assigning him or her to certain jobs. Although such situations are rarely encountered in so pronounced a form at the present time, prejudices and preferences based on social origin may still persist even where rigid stratification has disappeared. Even in open societies, where social mobility is widespread, a number of phenomena continue to impede complete equality of opportunity for various social categories despite measures adopted to increase training opportunities for certain social categories. The information brought to the attention of the Committee of Experts has rarely concerned cases of discrimination on grounds of social origin, which is frequently not covered in the same way as other grounds of discrimination by such numerous and generally applicable specific constitutional or legislative provisions.<sup>147</sup> This may be due to the fact that the measures to be taken cover a whole range of approaches lying within the competence of various sectors of government activity, the co-ordination of which is frequently a sensitive issue. It should be noted that, even if this is taken into consideration, the implementation of the Convention cannot be deemed fully satisfactory, since Article 2 lays down the obligation of declaring a national policy, one of the objectives of which is to eliminate any discrimination in employment and occupation on the basis of social origin.

55. In general, the legislative provisions that have been adopted are intended to remedy discrimination on this basis by establishing conditions of equality of opportunity and treatment for a number of categories of the population that are deemed to be underprivileged. In France, a report by an advisory body in the economic and social field reveals that overall measures favouring employment and training are of very little benefit to the most underprivileged social categories.<sup>148</sup> In order to combat insecurity, which may be defined as a lack of one or more aspects of security, and particularly employment, which enable individuals and families to fulfil their occupational, family and social obligations and to enjoy their

<sup>147</sup> It would appear, on the contrary, that this ground is often omitted from general provisions respecting equality of opportunity and treatment. See for example: Angola, s. 2 of the General Labour Act; Ethiopia, Proclamation No. 64 of 1975; Greece, art. 5 of the Constitution; Jamaica, art. 24 of the Constitution; New Zealand, Human Rights Commission Act, No. 49, 1977; Romania, s. 2 of the Labour Code.

<sup>148</sup> Economic and Social Council, "Grande pauvreté et la précarité économique et sociale", Paris, February 1987.

fundamental rights, the absence of which results in "great poverty", it has been proposed to launch a national plan based simultaneously on employment and training, a minimum income, housing and health. Improving access to basic training for children coming from the most underprivileged backgrounds is one of the aspects of the measures to combat great poverty. In India, the characteristics arising out of untouchability were abolished by article 17 of the Constitution, and by an Act adopted in 1955 respecting offences regarding untouchability. In order to strengthen administrative machinery and abolish untouchability in all its forms in all spheres of society, amendments to the 1955 Act were adopted in 1976.<sup>149</sup> In addition, many programmes aimed at members of recognised castes and tribes and at persons in underprivileged classes have been planned together with recommendations promoting the recruitment, employment and training of these groups. In 1982, a Commission set up to investigate the conditions of the socially and educationally disadvantaged recommended a series of measures aimed at encouraging access to employment and education;<sup>150</sup> the establishment of a proportion of jobs in the public service and in teaching establishments; an increase in the upper age limit for recruitment of members of these groups; keeping open unfilled posts allocated under the quota for a period of three years; etc. These recommendations were submitted to Parliament. In Japan, various provisions have been adopted in order to resolve the problem of a minority of the population living in specific areas (Buraku) which is subject to discriminatory practices concerning its social position.<sup>151</sup> A Law on measures concerning regional improvement projects was adopted on 31 March 1987. The Law includes new aspects which are a product of the results obtained from 13 years of applying the previous legislation on special measures concerning integration projects and as a result of a re-examination of the provisions that were adopted previously in the light of the problems that remain to be solved, namely: the adoption by the central administration of detailed directives to regional administrations; changes of attitude of regional and local administrative units with regard to this issue; changes in the mentality of the members of the community; etc. The regional improvement projects (Dowa projects) are intended, inter alia, to encourage employment and promote activities in the field of education and culture.

56. Legislative provisions and regulations which may have the effect of introducing discrimination in employment and occupation on the basis of social origin are infrequent. They may consist of preferences afforded to individuals on the basis of their social origin or the merits of their parents in order to obtain a job or

<sup>149</sup> Act of 1976 respecting offences regarding untouchability and other provisions, which came into force on 19 November 1976.

<sup>150</sup> ILO, Social and Labour Bulletin, 3/1982, p. 409.

<sup>151</sup> In this connection, see the Japanese Government's statement on the Dowa problem, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1983/39. According to the Prime Minister's office, on 31 July 1987, there were 4,603 Buraku zones with a population of 1,166,465.

receive training,<sup>152</sup> or in exclusion from certain jobs or training courses on the same grounds.

### F. Political opinion

57. Within the context of the policy to promote equality of opportunity and treatment, the Convention provides for the elimination of any discrimination on the basis of political opinion. The Committee of Experts has indicated that, in protecting workers against discrimination with regard to employment and occupation on the basis of political opinion, the Convention implies that this protection shall be afforded to them in respect of activities expressing or demonstrating opposition to the established political principles - since the protection of opinions which are neither expressed nor demonstrated would be pointless.<sup>153</sup> Regarding the nature of the opinions expressed, the Committee noted that "the protection afforded by the Convention is not limited to differences of opinion within the framework of established principles. Therefore, even if certain doctrines are aimed at fundamental changes in the institutions of the State, this does not constitute a reason for considering their propagation beyond the protection of the Convention, in the absence of the use or advocacy of violent methods to bring about that result".<sup>154</sup> The Committee of Experts recalls the opinion expressed by a Commission of Inquiry appointed under article 26 of the Constitution of the ILO that "the protection of freedom of expression is aimed not merely at the individual's intellectual satisfaction at being able to speak his mind, but rather - and especially as regards the expression of political opinions - at giving him an opportunity to seek to influence decisions in the political, economic and social life of his society. For his political views to have an impact, the individual generally acts in conjunction with others. Political

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<sup>152</sup> The Committee of Experts noted in particular that in the German Democratic Republic, the Order of 5 December 1981 concerning admission to polytechnic secondary schools lays down, among other provisions, that eminent achievements of a candidate's parents in building socialism shall be taken into account in decisions concerning the admission of students and their continuation in the establishment; RCE 1987, p. 362.

<sup>153</sup> RCE 1972, p. 204; RCE 1982, pp. 192 and 198; RCE 1983, pp. 204, 207, 212, 218, 225; RCE 1986, p. 266; see also the Report of the Committee Set up to Consider the Representation Presented by the ICFTU under article 24 of the Constitution Alleging Non-Observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by Czechoslovakia, ILO, Official Bulletin, Vol. LXI, 1978, Series A, No. 3; Supplement, paras. 17-21; see also the Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, ILO, Official Bulletin, Vol. LXX, 1987, Series B, Supplement 1, paras. 515-520.

<sup>154</sup> RCE 1986, p. 284.



organisations and parties constitute a framework within which the members seek to secure wider acceptance of their opinions. To be meaningful, the protection of political opinions must therefore extend to their collective advocacy within such entities. Measures taken against a person by reference to the aims of an organisation or party to which he belongs imply that he must not associate himself with those aims, and accordingly restrict his freedom to manifest his opinions."<sup>155</sup>

58. Many constitutional and legislative provisions prohibit discrimination on the basis of political opinion either in general terms<sup>156</sup> or more specifically in the fields of training, employment and occupation.<sup>157</sup> Most of these provisions make reference, as

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<sup>155</sup> loc. cit., ILO, Official Bulletin, Vol. LXX, 1987, Series B, Supplement 1, para. 515.

<sup>156</sup> Antigua and Barbuda, arts. 3 and 14(3)(5)(7) of the Constitution; Belize, art. 3 of the Constitution; Bolivia, art. 7 of the Constitution; Botswana, arts. 3, 10(13) and 15(3) of the Constitution; Burundi, art. 11 of the Constitution; Cameroon, Preamble to the Constitution; Costa Rica, art. 28 of the Constitution; Denmark, art. 71 of the 1953 Constitution; Dominican Republic, art. 8(6) of the 1966 Constitution; Egypt, art. 47 of the Constitution; Equatorial Guinea, art. 20, para. 3(1), of the Constitution; Fiji, arts. 3 and 15, para. 2, of the Constitution; Gabon, art. 1, para. 4 of the Constitution; Federal Republic of Germany, art. 3(3) of the Constitution; Greece, art. 5(2) of the Constitution; Guatemala, art. 5 of the 1985 Constitution; Guinea-Bissau, art. 17 of the Constitution; Guyana, arts. 40(1) and 149(1)(4) of the Constitution; Haiti, art. 28 of the Constitution; Italy, art. 3 of the Constitution; Jamaica, arts. 13 and 24 of the Constitution; Liberia, arts. 11(b) and 18 of the Constitution; Libyan Arab Jamahiriya, art. 13 of the Constitution; Mali, art. 16 of the Constitution; Malta, arts. 32 and 45(3) of the Constitution; Mauritius, arts. 3 and 16 of the Constitution; Netherlands, art. 1 of the Constitution; Panama, arts. 19 and 62 of the Constitution; Papua New Guinea, art. 5 of the Constitution; Peru, art. 2, para. 4 of the Constitution; Philippines, art. 3, para. 18, of the Constitution; Portugal, arts. 13(2) and 60 of the Constitution; Rwanda, art. 16 of the Constitution; Saint Lucia, art. 1 of the Constitution; Sao Tome and Principe, s. 15(1) of the Constitutional Act; Senegal, Preamble and art. 8 of the Constitution; Seychelles, Preamble to the Constitution; Solomon Islands, arts. 3 and 15 of the Constitution; Spain, art. 16 of the Constitution; Sri Lanka, art. 12(2) of the Constitution; Sudan, art. 17(2) of the Constitution; Togo, art. 4 of the Constitution; Zaire, art. 27(2) of the Constitution; Zambia, arts. 13 and 25(1)(3) of the Constitution; Zimbabwe, arts. 11 and 23(1)(3) of the Constitution.

<sup>157</sup> Italy, Act No. 300 of 20 May 1970, to make provisions respecting the protection of workers' freedom and dignity, trade union freedom and freedom of action within the workplace, and provisions respecting placement, LS 1970-It. 2; Swaziland, ss. 29 and 35 of the 1980 Employment Act; Zimbabwe, s. 5(7) of the 1984 Labour Relations Act.



unlawful grounds of discrimination, to political opinion or beliefs, while others refer to political affiliation, and some specify that these expressions imply belonging to a political group or party of one's choice, the fact of participating actively in a political association or maintaining relations with members of a political association, candidacy in elections and the act of expressing one's opinion on the way in which society and government operate or should operate. In some countries that have adopted constitutional or legislative provisions or regulations prohibiting discrimination on a number of grounds enumerated in a restrictive list, political opinion has been omitted.<sup>158</sup> In the absence of explicit reference to political opinion in the provisions respecting equality of opportunity and treatment, the Committee of Experts has requested information on the measures taken to eliminate discrimination on the basis of political opinion.<sup>159</sup> The Committee of Experts has noted with satisfaction that the new General Labour Act in one of these countries makes reference to political opinion among the grounds of discrimination in respect of which it prohibits discrimination in employment and occupation.<sup>160</sup> A Government<sup>161</sup> indicated that the ground of political opinion was included in the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights, which had both been ratified by the State in question, and that the complete title of the Act forbidding discrimination made express reference to these two Covenants, thus conferring a broad mandate on the bodies responsible for ensuring the application of the Act. Where provisions are adopted in order to give effect to the principle contained in the Convention,

<sup>158</sup> Angola, art. 18 of the Constitution and s. 2 of the General Labour Act; Cape Verde, art. 22 of the Constitution; Ethiopia, Labour Proclamation No. 64; Mongolia, art. 76 of the Constitution; Nepal, art. 10 of the Constitution and s. 4 of the Civil Rights Act No. 2012; New Zealand, ss. 15, 19, 21, 22 and 26 of Act No. 49 of 1977; Romania, s. 2 of the Labour Code; Sierre Leone, art. 17 of the Constitution; Trinidad and Tobago, art. 4(d) of the Constitution; Yugoslavia, art. 154 of the Constitution.

<sup>159</sup> The Austrian Congress of Chambers of Labour, in its comments on the Government's report due under article 22 of the ILO Constitution concerning the application of Convention No. 111 for the 1986-87 period, indicated that, under the predominant case law, it was not possible to take action through the courts in cases of dismissal on grounds of political opinion and religion, since s. 105 of the Federal Act of 14 December 1973 respecting collective labour relations does not refer to these grounds of discrimination.

<sup>160</sup> Mozambique, RCE 1988, Act No. 8 of 1985 to approve the Labour Act, LS 1985-Moz. 1; see also Guinea-Bissau, s. 24(d) of the 1986 Labour Code.

<sup>161</sup> New Zealand. The complete title of the Human Rights Commission Act, No. 49, 1977, is as follows: "An Act to establish a Human Rights Commission and to promote advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights".

they should include all the grounds of discrimination laid down in Article 1, paragraph 1(a), of the Convention.

59. Widespread recognition is given in law to the prohibition of discrimination in employment and occupation on the basis of political opinion. Since the last General Survey, the Committee of Experts has had occasion to note that in several countries certain provisions that are contrary to the requirements of the Convention have been repealed. In Argentina, Act No. 17401 of 22 August 1967, which excluded from public office or employment persons classed as being or having been engaged in activities motivated by certain political opinions, was repealed by Act No. 20509 of 27 March 1973.<sup>162</sup> The Act of 26 March 1975 (which came into force on 1 July 1975) repealed, in sections 46(1)(e) and 53(1)(c) of the Labour Code of Czechoslovakia, the references which had been introduced in 1969 concerning dismissal in cases where a worker has engaged in an activity "calculated to cause a breach of the Socialist Social Order" and was not "sufficiently worthy of confidence to occupy his function or post".<sup>163</sup> In Egypt, Presidential Order No. 29 of 27 September 1975 eliminated the compulsory membership of journalists in the Arab Socialist Alliance.<sup>164</sup> In Yugoslavia, the reference to "moral and political suitability" as a condition for holding certain jobs was ruled unconstitutional by the meeting of Presidents of the Constitutional Courts on 19 December 1979, and the reference is to be gradually eliminated from legislation and from job offers.<sup>165</sup> In Greece, section 18 of Act No. 1400 of 1983 repealed the provisions of earlier legislation respecting the obligation for public administrations and public societies and organisations to keep individual files on each staff member containing information on their political opinions and activities and their loyalty to the established régime. The Act also provides for the destruction of such files and of any material making it possible to evaluate the political opinions of the persons concerned.<sup>166</sup>

60. However, there remain numerous problems. In a previous General Survey, the Committee of Experts noted that "one of the essential traits of this type of discrimination is that it is most likely to be due to measures taken by the State or the public authorities. Its effects may be felt in the public services, but are not confined thereto; moreover, in many modern economies the distinction between the public and private sector has become blurred or has disappeared completely."<sup>167</sup> In some countries, the laws and regulations prohibit the employment of persons on the grounds of their membership in certain political parties, both in the public sector and

<sup>162</sup> RCE 1975, p. 161.

<sup>163</sup> RCE 1976, p. 174.

<sup>164</sup> RCE 1978, p. 195.

<sup>165</sup> RCE 1981, p. 177.

<sup>166</sup> RCE 1987, pp. 366-367.

<sup>167</sup> General Survey, 1963, para. 26.

in a number of jobs in the private sector,<sup>168</sup> or exclude persons from the protection afforded by the laws enshrining the principle of equality, on the grounds of their membership in a political party.<sup>169</sup> In other countries, despite the existence of constitutional or legislative provisions respecting equality of opportunity and treatment without discrimination, a number of texts indicate that with regard to employment in a large number of jobs in all sectors of activity, account is to be taken of political and socio-political attitudes, of civic commitment and moral and political qualities.<sup>170</sup> The same criteria are in some cases taken into

<sup>168</sup> Chile: art. 8 of the Constitution, under which any Act by a person or group that is intended to disseminate certain doctrines, including those that promote a concept of society, of the State or the judicial system "of a totalitarian nature or based on class struggle" is unlawful and contrary to the institutional order of the Republic. Organisations, movements or political parties which, owing to their objectives or the activities of their members, are directed towards similar objectives are unconstitutional. Persons guilty of such offences may not be employed by the State or exercise public duties for a period of 10 years, are automatically dismissed from such jobs if they are employed in them, and may not during that period be rectors or heads of teaching establishments, teachers or trade union leaders, nor, in the field of mass communication media, exercise activities related to the publication or dissemination of opinions or information; Act No. 18,662 of 23 October 1987, which sets standards in relation to the effects of decisions of the Constitutional Court, extends the application of art. 8 of the Constitution; Paraguay: ss. 10 and 11 of the Defence of Democracy Act, which forbids the employment by the State or in public services of persons affiliated to the Communist Party or to organisations the objective of which is to disseminate "any doctrines or systems proposing to destroy or change through violence the republican and democratic régime of the Nation".

<sup>169</sup> United States: s. 703(f) of the Civil Rights Act of 1964 provides that unlawful employment practices shall not be deemed to include any action or measures taken by an employer, labour organisation, joint labour-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organisation required to register pursuant to the Subversive Activities Control Act of 1950; see also the Fair Employment Practices Act of Nebraska (s. 48-1109) and of Nevada (s. 613.360)

<sup>170</sup> China: by virtue of s. 7 of the Provisional Regulations adopted on 12 July 1986 by the State Council on the recruitment of workers in state-run enterprises, a comprehensive examination covering, inter alia, political integrity shall be carried out when the enterprise recruits a worker. "The contents and level of the examination may differ depending upon the requirements of the particular job or type of production." LS 1986-China 2; Cuba, the statement of the objectives of Resolution No. 428 of the State Committee for Labour and Social Security, dated 14 March 1980, (footnote continued on next page)

consideration with regard to access to education and training.<sup>171</sup> The Committee noted, in a country that has ratified the Convention, that political criteria are considered to be essential in access to a broad range of senior management positions in the economy, that access to all such functions is monitored by a political party and that employees may be dismissed for failing to fulfil political requirements, even in cases where their work performance has been beyond reproach.<sup>172</sup> It recalled that in cases in which one of the criteria cited by the Convention is taken into consideration in determining the inherent requirements of a job, an objective reappraisal should be made in order to determine whether these prerequisites are really justified by the requirements of the job.<sup>173</sup>

61. In the public sector, it would appear from the available information that in many countries special provisions lay down

(footnote continued from previous page)

establishing standards for the assessment of the merits of members of the working press, provides that the latter must demonstrate qualities of an ideological and political nature; German Democratic Republic, RCE 1987, pp. 362-364, s. 13(1) of the Act of 1 March 1981 concerning lawyers' associations, s. 7 of the Regulations of 12 January 1984 on the work, direction and organisation of the pharmaceutical sector and s. 4 (2) of the Driving School Regulations; Mozambique, s. 2 of the Order of the Secretary of State for Labour, dated 21 May 1982, under which the designation of any worker to a position of foreman or director shall be subject to preliminary assessment by the director responsible for his or her nomination taking into account, inter alia, the political qualities of the appointee; Romania, s. 2 of State Council Decree No. 413 of 5 December 1979, approving the conditions of employment in civil aviation, which provides that staff shall have a high political awareness and shall demonstrate limitless devotion towards, inter alia, the Party; s. 62(s) of Act No. 5 of 1978, as amended by Act No. 24 of 23 December 1981 on the organisation and operation of State Socialist Enterprises, provides that the collective management body shall reach decisions concerning promotions to managerial level in the enterprise with due consideration to political training.

<sup>171</sup> German Democratic Republic, RCE 1987, p. 360-362. The Committee considered that a number of the criteria included in the conditions for access to, and for success in, advanced education and training, as well as the role assigned in evaluating fulfilment of these criteria to an organisation responsible for implementing the objectives of a political party, are not consistent with a policy designed to eliminate any discrimination based on social origin.

<sup>172</sup> Czechoslovakia, RCE 1982, pp. 197-199; RCE 1983, pp. 212-213; RCE 1984, pp. 261-262; RCE 1985, p. 286, the Committee "noted that the principles laid down in the Resolution of 6 November 1970 are not limited to posts or employment in the Party or policy-making functions in Government but apply to supervisory personnel in all spheres of society".

<sup>173</sup> *idem*, RCE 1985, p. 286; see also, Chapter III, Section 1, below.

regulations respecting the rights and duties of public servants<sup>174</sup> and for various types of public sector employees and employees in public enterprises. In some countries, restrictions are imposed on public servants and State employees respecting the exercise of their political rights and the Committee of Experts has requested the governments concerned to supply information on the scope of these restrictions in order to ensure observance of the Convention in this respect.<sup>175</sup> The legislation in certain countries states that public servants shall exercise their functions faithfully or that they may be dismissed if they do not faithfully fulfil their obligations or lose the trust necessary for their position. In general, the concept of loyalty is interpreted in practice as requiring public officials in service to conscientiously fulfil their obligations and observe the neutrality of the public service and, outside their employment, to exercise the discretion that is required by their position when expressing their political opinions. In one country, each public servant's obligation to exercise discretion is evaluated in consideration of the nature of his or her position and rank in the hierarchy and the circumstances in which he or she expresses his or her opinions.<sup>176</sup> The extent of the

<sup>174</sup> Finland, Act of 1986 respecting public servants, which came into force on 1 January 1988; France, Public Service Regulations and provisions governing territorial communities, Acts Nos. 83-634 of 13 July 1983, laying down the rights and obligations of public servants, 84-16 of 11 January 1984 laying down provisions concerning the conditions of employment of the State Public Service, 84-53 of 26 January 1984, laying down provisions concerning the conditions of employment in the public service in the territories; Italy, see footnote to paragraph 29 below.

<sup>175</sup> Nepal, ss. 9-13 of Regulations No. 2021 respecting the public service, under which no State employee may, in any way whatsoever, take part in political activities under penalty of termination of his contract or dismissal; Syrian Arab Republic, s. 65 (i) of Act No. 1 of 2 January 1985 issuing regulations governing the public service.

<sup>176</sup> France: as inferred from the jurisprudence of the Council of State, the rule requiring discretion has been embodied in texts for magistrates (s. 10 of the Order of 22 December 1958), members of the Council of State (s. 4 of the Decree of 30 July 1963) and for military personnel (s. 7 and following of the Act of 13 July 1972); see Council of State, 10 March 1971, Sieur Jannès, AJDA, 1971, p. 622-624, "considering that although public servants, as all citizens, enjoy the right to participate in elections and the campaign preceding them, they are required to do so in conditions which do not constitute a breach on their part of the obligation to maintain discretion under which they are bound in respect of their administration"; see also, Argentina: in an Order of 17 June 1986, Fiscal del Superior Tribunal de Justicia v. Ormache, José Eduardo, the Supreme Court of Justice ruled that art. 157 of the Constitution of the Province of Entre Rios was unconstitutional; this section provides that it is absolutely prohibited for public servants employed in the justice department to carry out political activities unless they are justified in so doing by reasons of public interest or common well-being.

obligation of loyalty varies considerably from country to country, from, at one end of the spectrum, the requirement of a passive attitude and of abstention, implying an assumption of loyalty by all officials, to a more active attitude involving constant demonstration of loyalty.<sup>177</sup> In cases where the obligation of faithfulness is not written into law, the Courts have often found that an official is subject to an obligation to exercise discretion which does not prevent him or her from using certain media and techniques of expression, but which prohibits him or her from employing his or her position as an instrument for action or propaganda. In some countries, the political activities of certain categories of officials are subject to restrictions which may, according to the rank of the official, extend to the prohibition of any political activity, irrespective of the party involved.<sup>178</sup> These restrictions are imposed with a view to maintaining the reputation of the public service for political impartiality and in most cases do not concern the application of the Convention.<sup>179</sup> The question arises in practice, however, of ascertaining whether such restrictions lead to discrimination on the basis of political opinion for the categories of workers concerned.

62. A number of countries reported that, although state employees were generally protected against discrimination on grounds

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<sup>177</sup> Federal Republic of Germany, report cited above, paras. 557-573; the Commission of Inquiry concluded that "the undifferentiated application of the duty of faithfulness to all officials, without regard to the effect which their political attitude or activities may have on the exercise of the functions assigned to them, does not appear to correspond to the inherent requirements of all the kinds of work involved". In Zaire, s. 49 of the Public Service Regulations, cited above, provides, inter alia, that the official "shall demonstrate in all circumstances an unflinching commitment to the ideals of the Party".

<sup>178</sup> In the United States, in accordance with the Hatch Act, Federal government officials are forbidden to participate actively in the running of parties or political campaigns; this Act does not affect their right to vote or to express their opinions. The States have generally adopted laws similar to the Hatch Act, covering the political activities of their officials; United Arab Emirates, s. 59 of Federal Act No. 8 of 1973 respecting the public service in the Federal administration. The jobs covered, in accordance with ss. 2 and 4 of the Act, include permanent positions at management level, and at the higher and intermediary administrative levels, but exclude lower-level employees; Philippines: Executive Order No. 276 amending Republic Act No. 1700 permanently disqualifies members of the Communist Party of the Philippines from holding any appointive public office. A public mediation office has been set up and includes in its functions the supervision of decisions against public servants taken under Order No. 276 (Executive Order No. 243 of 3 September 1987).

<sup>179</sup> See, for example, Canada: by virtue of s. 32 of the Public Service Employment Act, a public servant seeking to be a candidate in a federal, provincial or territorial election must apply to the Public Service Commission for leave of absence without pay.



of political opinion, certain individuals exercising decision-making functions who were appointed without going through a competition for their jobs may be chosen on the basis of their political opinions. In the United States, the Government indicates in its report that a newly elected President or State Governor may appoint new people on the basis of their political affiliation to most of the major policy-making positions in the administration. In Colombia, the Constitution formerly provided for a system of parity between the two main political parties with regard to senior posts in the public administration; the Committee of Experts requested the Government to supply information concerning the number and nature of the posts considered by the Government to be subject to "the power of free appointment and dismissal".<sup>180</sup> In France, the conditions of employment of the public service provide for the existence of senior posts, of which a restrictive list is given in a decree, to which appointments are left to the discretion of the Government. The Supreme Administrative Tribunal has consistently ruled that the persons employed in these posts could at any time be dismissed for political reasons, even in the absence of an offence that would justify a disciplinary measure.<sup>181</sup>

63. In some countries, there is a discernible trend to bring industrial relations in the public service more into line with those of the private sector.<sup>182</sup> In Italy, the Framework Act on Public Employment of 29 March 1983 extended certain provisions of Act No. 300 of 20 May 1970 to public servants, and in particular the guarantee of freedom of opinion and free expression of thoughts, the prohibition on employers making inquiries concerning political opinions and the nullification of any agreement or act resulting in discrimination on the basis of political opinion. In Norway, with the exception of a small percentage of public servants (Beamte), state employees are regulated by the provisions of the Act of 4 February 1977 respecting workers' protection and the working environment, which applies to employees in the private sector. In Sweden, the provisions of the labour legislation are applicable to employment relationships in the public service and few residual public law regulations remain in force.<sup>183</sup>

<sup>180</sup> RCE 1986, p. 268.

<sup>181</sup> See for example Council of State, 17 January 1973, Sieur Cazelles, AJDA 1973, p. 597; see also Decree No. 85-779 of 24 July 1985, issued under s. 25 of the Public Service Regulations, which establishes the senior posts for which appointment is left to the decision of the Government, and Decree No. 85-834 of 6 August 1985 respecting appointment to managerial posts in certain public establishments, enterprises and state societies.

<sup>182</sup> In this connection, see Tiziano Treu et al., Public Service Labour Relations - Recent Trends and Future Prospects, Geneva, 1987, p. 42.

<sup>183</sup> See, for example, the Public Employment Act of 23 June 1976 establishing rules concerning appointments, assignment to more than one job, termination of functions and discipline.

## Subsection 2. Other grounds of discrimination

64. Article 1, paragraph 1(b), of the Convention, and the corresponding paragraph of the Recommendation, provide that for the purposes of their application, in addition to the seven grounds of discrimination laid down in Article 1, paragraph 1(a), "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...] may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies", within the framework of the national policy designed to promote equality of opportunity and treatment in respect of employment and occupation. The information supplied by governments in their reports does not allow conclusions to be drawn concerning the extent of consultations with employers' and workers' organisations or other appropriate bodies, or even whether they have taken place. It may be inferred, however, from the available legislative provisions that some specialised bodies, set up to ensure the implementation of the national policy of equality of opportunity and treatment, enjoy advisory status regarding any proposed legislation on these matters or that their competence extends further and that they are empowered to make proposals or intervene in parliamentary procedures, etc. In several cases, the representatives of employers' and workers' organisations participate in their own areas in the activities of these specialised bodies or are associated in various ways with their work.<sup>184</sup> The participation of employers' and workers' organisations in the determination of grounds of discrimination other than those expressly referred to in the 1958 instruments is of particular importance since it provides an additional guarantee of the acceptance and implementation of the policy.

65. In view of the above, it would appear from an examination of the reports that in a large number of countries grounds of discrimination other than those set forth in Article 1, paragraph 1(a), of the Convention have been included in constitutional and legislative provisions and in regulations intended to eliminate discrimination in employment and occupation. Grounds such as language, age, disability, membership or non-membership in a trade union, which were envisaged during the preparatory work for the 1958 instruments, were not included in the final version of Article 1, paragraph 1(a). A number of other grounds, such as pregnancy and maternity,<sup>185</sup> have been deemed to be already partially or totally covered by the grounds set out in the above Article. Others, such as age, disablement, family responsibilities<sup>186</sup> were included in Article 5, paragraph 2, as special measures of protection and assistance not deemed to be discriminatory. To these have been added grounds such as a person's criminal indictment or conviction or

<sup>184</sup> See below, Chapter IV, Section 2, Subsection 3.

<sup>185</sup> See paras. 41 and 42 above.

<sup>186</sup> See paras. 42 and 43 above.



criminal records,<sup>187</sup> convictions that have been pardoned,<sup>188</sup> educational level,<sup>189</sup> place of birth, legitimacy of birth,<sup>190</sup> sexual orientation,<sup>191</sup> physical or mental state of health, medical history, family relationship with other workers in the

<sup>187</sup> United States, Hawaii, Fair Employment Practices Act, s. 378-2; Illinois, Human Rights Act, s. 2-103: it is a civil rights violation to inquire whether a job applicant has ever been arrested. However, this does not prohibit a unit of local government or school district from utilising information of this nature to evaluate the qualifications and character of an employee or a prospective employee, s. 111.335; Wisconsin, Fair Employment Act, s. 111.335.

<sup>188</sup> Canada, s. 3(1) of the Canadian Human Rights Act, cited above; s. 20 of the Act defines a conviction for which a pardon has been granted as a "conviction of an individual for an offence in the respect of which pardon has been granted by an authority under law and, if granted under the Criminal Records Act, not revoked."

<sup>189</sup> Angola, art. 18 of the Constitution; Byelorussian SSR, art. 32 of the Constitution; Bulgaria, art. 35 of the Constitution; Cape Verde, art. 22 of the Constitution; China, art. 34 of the Constitution, cited above; Guinea-Bissau, art. 13 of the Constitution; Mozambique, art. 26 of the Constitution; Poland, arts. 67 and 81 of the Constitution; Portugal, art. 13 of the Constitution; Suriname, s. 2 of the Constitutional Decree; USSR, art. 34 of the Constitution; Yugoslavia, art. 154 of the Constitution.

<sup>190</sup> See for example Guinea-Bissau, art. 25(2) of the Constitution: "Children are equal before the law irrespective of the civil status of their parents." The European Court of Human Rights, in the case of Inze v. Austria (25 October 1987, Series A, No. 126) indicated that provisions which establish the priority of legitimate over illegitimate children in matters of inheritance are contrary to Article 14 of the European Convention on Human Rights (Prohibition of Discrimination) read together with Article 1 of the First Additional Protocol to the Convention (Property Rights). The Court reaffirmed its prior decisions which had held that a difference in treatment is discriminatory if it does not have an objective and reasonable justification and rejected the arguments put forth by the Government founded on the traditional beliefs of the rural population on the matter. See also below, Chapter II, Section 2, para. 90.

<sup>191</sup> Canada, Quebec, Quebec Charter of Human Rights and Freedoms; United States, District of Columbia, Human Rights Act, 1977, s. 1-2512(a); sexual orientation includes male or female homosexuality, heterosexuality and bi-sexuality, by preference or practice, s. 1-2502(29); Wisconsin, s. 111.321 of the Act cited above; France, Penal Code, s. 416, as amended by the Act of 25 July 1985 (which prohibits discrimination in employment and occupation on grounds, in particular, of the habits of the employee); Sweden, an amendment to the Penal Code, which came into force on 1 July 1987, includes homosexuality among the prohibited grounds of discrimination.

enterprise,<sup>192</sup> accent,<sup>193</sup> physical appearance, status regarding public assistance,<sup>194</sup> atypical hereditary cellular or blood trait,<sup>195</sup> etc.

66. Among the grounds of discrimination determined by various countries, some partially cover one or more grounds set forth in Article 1, paragraph 1(a), of the Convention.<sup>196</sup> Other grounds, such as height and weight,<sup>197</sup> may give rise to indirect discrimination on the basis of sex,<sup>198</sup> although they may also serve as the basis of other types of discrimination that are related in certain ways to physical appearance, in the case of persons who are small or corpulent.<sup>199</sup> In Belgium, a body set up to ensure the

<sup>192</sup> See, for example, Spain, s. 17(1) of the Workers' Charter (which nullifies clauses in collective agreements containing discrimination or preference on grounds including this ground).

<sup>193</sup> United States, Hawaii, Resolution No. 144 adopted by Hawaii's Senate on April 24 1986, requesting that the State's Department of Labour and Industrial Relations incorporate into administrative rules the prohibition of employment discrimination because of accent.

<sup>194</sup> United States, North Dakota, Fair Employment Practices Act, s. 14-02.4-02 (15). Status with regard to public assistance is defined as the condition of being a recipient of federal, state, or local assistance, including medical assistance.

<sup>195</sup> United States, Louisiana, Fair Employment Practices Law (sickle cell trait); New Jersey, Law Against Discrimination, s. 10:5-12; atypical hereditary cellular or blood trait includes sickle cell trait, haemoglobin C trait, thalassaemia trait, Tay-Sachs trait, cystic fibrosis trait, s. 10:5-5(x).

<sup>196</sup> See, for example, para. 37 above for grounds related to national extraction.

<sup>197</sup> United States, Michigan, Civil Rights Act, Article 2, s. 203.

<sup>198</sup> See below, para. 44, for grounds related to sex.

<sup>199</sup> The Human Rights Act of 1977 of the District of Columbia, in s. 1-2512, forbids discrimination in employment on the basis of personal appearance; this is defined as the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and personal grooming, including, but not limited to, hairstyle and beards. It does not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied to a class of employees, for a reasonable business purpose; or when such characteristics present a danger to the health, welfare or safety of any individual (s. 1-2502 (22)). See also "Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance", Harvard Law Review, Vol. 100, No. 8, June 1987, pp. 2035-2052. In his analysis of the types of discrimination in respect of employment to which certain persons (physically unattractive persons) are subject in the United States, the author of the paper proposes that discrimination on the basis of physical

(footnote continued on next page)

application of the non-discrimination policy reported, with regard to physical criteria used for recruitment or promotion, that these criteria could lead to discrimination. The body considered that when account is given to criteria connected with physical characteristics, this should be strictly justified by the nature of the general tasks involved in the particular job, that the justification should be of a technical nature, and that it should take into account existing modern technical means that could facilitate the work involved.<sup>200</sup> Physical characteristics which would be used only occasionally in the job in question could not be used as criteria for recruitment or promotion.

67. Since the last General Survey, two Conventions accompanied by corresponding Recommendations, have been adopted by the International Labour Conference; one on workers with family responsibilities and the other concerning the vocational rehabilitation and employment of disabled persons. These instruments are aimed at the elimination of grounds of discrimination that were not explicitly set forth in Article 1, paragraph 1(a), of Convention No. 111, but which had, in several countries, been the subject of provisions adopted within the framework of the national policy set forth in Article 2 of the Convention.

## Workers with family responsibilities

68. The objective of the Workers with Family Responsibilities Convention, 1981 (No. 156), is to create effective equality of opportunity and treatment for men and women workers with family responsibilities, and between these and other workers.<sup>201</sup> The Convention provides that each State shall, among the objectives of a

(footnote continued from previous page)

appearance should be taken into account under the provisions of the Rehabilitation Act of 1973, the objective of which is to ensure equality of opportunity for disabled persons, as had been done by a number of tribunals in federated States (see however, for an opposite view, American Motors Corp. v. Labor and Industry Review Commission (Wis. 1984) (SCT, 36 EPD), where the Court ruled that a jobseeker one meter 50 centimeters tall and weighing 105 pounds was not a disabled person under the terms of the Act). Strict weight requirements imposed by an airline on its female cabin staff cannot be justified by the company's desire to employ attractive staff (Gordon v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982), cert. denied, 460 U.S. 1074 (1983)). In addition to discrimination on the basis of sex - the requirement was imposed only on women - the measure constitutes discrimination on the basis of an aspect of physical appearance, namely, weight.

<sup>200</sup> Belgium, Opinion No. 44 of 22 September 1986 of the Office of the Women's Labour Commission, regarding the physical criteria for recruitment and promotion.

<sup>201</sup> As of 23 March 1988, Convention No. 156 had been ratified by 11 States: Argentina, Finland, Niger, the Netherlands, Norway, Peru, Portugal, Spain, Sweden, Venezuela, Yugoslavia.

national policy of equality of opportunity and treatment, aim to enable persons with family responsibilities to be employed without being subject to discrimination<sup>202</sup> and, to the extent possible, without conflict between their employment and family responsibilities. Measures compatible with national conditions and possibilities shall be taken in order to enable workers with family responsibilities to exercise free choice of employment and to take account of their needs in terms and conditions of employment and social security. Measures shall also be taken to develop or promote community services, public or private, such as child-care and family services and facilities. The Convention also provides that measures shall be taken to promote information and education which engender broader public understanding of the principle of equality of opportunity and treatment and the problems of workers with family responsibilities, as well as "a climate of opinion conducive to overcoming these problems."<sup>203</sup> Measures shall also be taken to enable the workers in question to re-enter the labour force after an absence due to their family responsibilities. Finally, the Convention excludes family responsibilities, as such, from constituting a valid reason for termination of employment. The Recommendation adds a number of provisions concerning the content of the national policy recommended in the fields of training and employment, conditions of work, social services and social security. It also provides for the promotion of activities to lighten the burden deriving from family responsibilities.

#### Disabled persons

69. The objective of the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and the corresponding Recommendation is the formulation, implementation and periodic review of a policy on vocational rehabilitation and employment of disabled persons, on the basis of the principle of equal opportunity between disabled workers and workers generally.<sup>204</sup> For the purposes of the Convention, the term "disabled person" means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.<sup>205</sup> Equality of opportunity and treatment between men and women disabled workers shall

<sup>202</sup> Article 3, para. 2, of Convention No. 156 specifies that the term "discrimination" means "discrimination in employment and occupation as defined by Articles 1 and 5 of the Discrimination (Employment and Occupation) Convention, 1958."

<sup>203</sup> Article 6 of Convention No. 156.

<sup>204</sup> As of 23 March 1988, the Convention had been ratified by 19 States: Argentina, China, Cyprus, Czechoslovakia, Denmark, El Salvador, Finland, Greece, Hungary, Ireland, Malawi, Netherlands, Norway, Peru, San Marino, Sweden, Switzerland, Uruguay, Yugoslavia.

<sup>205</sup> The definitions of "physical handicap" set out in legislation respecting discrimination in the United States vary considerably concerning the amplitude of the phenomena in question.

be respected. Furthermore, it provides that "special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers."<sup>206</sup> This provision corresponds to the principle set forth in Article 5, paragraph 2, of Convention No. 111, which provides that "other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance," may be deemed to be non-discriminatory, after consultation procedures have been followed. The 1983 Convention refers to the non-discriminatory nature of the "special measures" set forth by the 1958 instruments and emphasises their positive role in the effective implementation of the principle of equality of opportunity and treatment. In the context of the two Conventions, the concept of protection and assistance is allied to that of equality of opportunity and treatment.

## State of health

70. In determining a policy to promote equality of opportunity and treatment and applying the policy, several States have been led to examine the consequences that disabilities, and by extension the past or present mental or physical state of health of a person or group of people, may have on access to and the exercise of employment and an occupation. A number of countries have adopted provisions intended to make it possible for disabled persons, and particularly disabled veterans of war,<sup>207</sup> to obtain or maintain a job by means of quota systems or systems of priority employment or through opportunities to undertake training and acquire occupational skills. Furthermore, in some countries provisions intended to afford protection to disabled persons in respect of employment and occupation and to promote equality of opportunity and treatment, generally within the framework of a reasonable arrangement of the job, have been adopted for the disabled.<sup>208</sup> The same is not true for a person's physical or mental state of health, which is still often considered a priori to be an essential aspect of the employment relationship.<sup>209</sup> However, in

<sup>206</sup> Convention No. 159, Article 4.

<sup>207</sup> Algeria, Angola.

<sup>208</sup> Australia, Victoria, Equal Opportunity (Discrimination against Disabled Persons) Act, 1982, LS 1982-Aust. 1; United States, Rehabilitation Act of 1973; France, Act No. 87-517 of 10 July 1987 to promote the employment of disabled workers; Nepal, Act of 1982 respecting the protection and well-being of disabled persons; Netherlands, Employment of Handicapped Workers Act of 16 May 1986.

<sup>209</sup> See, for example, La lutte contre le cancer en France, Report to the Minister of Social Affairs and National Solidarity, Paris, La documentation française (Collection of official reports), 1986: "recruitment to the public service and the issue of permanent contracts has always been difficult for persons treated for cancer, where it is expected that a cure may not be definitive"; p. 120.

several countries the automatic nature of this relationship has been re-examined and has given rise to analysis based on the relation between a person's current state of health and the normal occupational requirements for the exercise of a particular job. Consequently, assessments of aptitude for a job must be made as a function of the current state of health or of an established prognosis, and not of previous or possible future problems. With regard to an individual's medical history, provisions which made it compulsory for persons who had suffered from specific illness (mental illness, cancer, tuberculosis, etc.) to provide guarantees regarding their health have been amended or abolished by the adoption of specific provisions or through the application of general provisions. There is no requirement for persons who have not suffered from such diseases to provide guarantees regarding their future state of health.

71. A similar problem arises with regard to carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus: provisions have been adopted to forbid AIDS diagnosis tests in connection with recruitment<sup>210</sup> and to maintain confidential the results of tests

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<sup>210</sup> United States, for example; Wisconsin: "No employer or agent of an employer may directly or indirectly: (a) solicit or require as a condition of employment of any employee or prospective employee a test for the presence of an anti-body to HTLV-III; (b) affect the terms, condition or privileges of employment or terminate the employment of any employee who obtains a test for the presence of an anti-body to HTLV-III." Restrictions are also established regarding the use of HTLV-III anti-body detection tests, which shall be subject to informed consent for testing or disclosure; Wisconsin, Act No. 73 of 1985, s. 2, International Digest of Health Legislation, USA (WI) 86.2; furthermore, in 1986, the United States Department of Health filed a complaint against a hospital receiving federal funds which had dismissed a male nurse suffering from AIDS and refused to consider him for any other job. The charge was based on the violation of s. 504 of the Rehabilitation Act of 1973, cited above, which prohibits discrimination on the basis of handicap in any programme or activity that receives federal financial assistance; Federal Republic of Germany: dismissal on the grounds that the employee is a carrier of the LAV/HTLV-III is not authorised and the tests may not be made compulsory by the employer, see Dr. A. Klak, "AIDS und die Folgen für das Arbeitsrecht", Betriebs-Berater, 20 July 1987, p. 1382-1387; for the contrary view see the Circular of 2 June 1987 of the Minister of the Interior of Bavaria, concerning the inclusion of an HIV anti-body detection test in the medical examination to which applicants for jobs are subject, inter alia, in the public service and the judiciary. In the event of the results of the test confirming that he or she is sero positive, the applicant must, if eligible, accept early retirement for permanent incapacity to work as a result of his or her state of health, International Digest of Health Legislation, FRG(Bav.)87.4.

that may be undertaken for the protection of the public health.<sup>211</sup> In the United Kingdom, the Department of Health has indicated that physicians who are carriers of the AIDS virus should be authorised to continue practising, except in special cases, and that patients should not have the right to ask their physician whether he or she is a carrier of the virus; the exceptions to this principle involve physicians whose specialisation involves a risk of contact through which the virus could be transmitted, such as certain types of surgery.<sup>212</sup> It would appear that the state of health of a person should be taken into account in assessing his or her or her aptitude for a specific job, although he or she should not be subject to the burden of proving his or her aptitude where the consequences of past or present diseases are concerned. The physical or mental state of health, disabilities in the broad sense of the term,<sup>213</sup> deficiencies,<sup>214</sup> and the medical history<sup>215</sup> of the individual have been included as forbidden grounds of discrimination in the legislation or in collective agreements in several countries. In the legislation of Canada, the concept of "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.<sup>216</sup> Furthermore, when examining complaints based on grounds of disability, the body responsible for the protection of human rights in the same

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<sup>211</sup> The confidential nature of the results of tests with regard to the employer is established in many provisions adopted in this connection. The Declaration of the Rights of AIDS Victims and Seropositive Persons, submitted by various NGOs to the International Symposium for Reflection on AIDS (Paris, 22-23 October 1987), provides in point 6 that "any action taken for discriminatory reasons to refuse carriers of the virus employment ... or to dismiss them from employment ... must be penalised."

<sup>212</sup> United Kingdom, Department of Health, November 1987.

<sup>213</sup> Australia, Victoria, Act cited above, in accordance with s. 2 of which the term "impairment" means total or partial loss of a bodily function, total or partial loss of a part of the body, malfunction of a part of the body, malfunction or disfigurement of a part of the body; malfunction of a part of the body includes a mental or psychological disease or disorder and "a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction"; United States, Connecticut, Human Rights and Opportunities Act, s. 46a-51(15); Hawaii, Employment Practices Act, s. 378-1; Indiana, Civil Rights Law, s. 22-9-1-3 (q); New Jersey, Law against Discrimination, s. 10:5-5(q); etc.

<sup>214</sup> Canada, s. 3(1) of the Canadian Human Rights Act.

<sup>215</sup> Belgium, Collective Labour Agreement of 6 December 1982; United States, California, Employment and Housing Act, s. 12926(f) "medical condition" means any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.

<sup>216</sup> Canada, s. 20 of the Canadian Human Rights Act.



country, between 1984 and 1986, examined widely differing types of mental and physical disability.<sup>217</sup>

### Age

72. In general, most of the governments' reports reveal that age is normally considered to be a physical condition for which there are particular needs and in respect of which special protection and assistance is recognised as being necessary, in accordance with the provisions of Article 5, paragraph 2, of the Convention. These measures will be further discussed in the section devoted to special protection and assistance measures. Several governments have raised the question of age, and particularly of elderly workers, in the context of the promotion of equality of opportunity and treatment, and no longer consider it exclusively within the framework of protection and assistance. A number of labour codes and specific legislative provisions expressly prohibit discrimination on the basis of age.<sup>218</sup> Nevertheless, it would appear that the protection afforded by these provisions must be read in conjunction with the provisions enabling workers who have reached the age of retirement that is in force in the specific sector of activity in the country to terminate their employment. Furthermore, upper age-limits that are set for access to certain categories of employment, such as jobs as public officials, for example, should be re-examined in order to determine the extent to which the restrictions are justified by the requirements of the job in question.

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<sup>217</sup> See in this respect, United States, Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985), persons suffering from contagious diseases are covered by s. 504 of the Rehabilitation Act of 1973 (tuberculosis). See also the decision taken by the Human Rights Commission of Florida in the case Shuttleworth v. Broward County of Budget and Management, according to which AIDS is a disability under the terms of the Florida Human Rights Act of 1977, Patricia A. Curylo, "AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?", The Wayne Law Review, Vol. 33, p. 1095-1110.

<sup>218</sup> Argentina, s. 17 of the Act respecting contracts of employment; Canada, s. 3(1) of the Canadian Human Rights Act; Colombia, s. 143 of the Substantive Labour Code ("differences in wages shall not be established on grounds of age ..."); Costa Rica, s. 1 of the Act forbidding discrimination in employment; Spain, s. 4(2)(c) of the Act of 10 March 1980, to promulgate a Workers' Charter ("freedom from discrimination, when seeking employment, on grounds of (...) age (within the limits specified in this Act), (...)"), LS 1980-Sp. 1; see also Australia, the Public Service Reform Act 1984, as amended, which aims to abolish any discrimination on grounds of age for employees in this sector; France: Act No. 71-58 of 12 July 1971 forbids publication in the press of a job offer wherein a required higher age-limit is given, subject to the age requirements set out in legislative provisions or regulations.



73. Discrimination on the basis of age should thus be seen in relation to a compulsory retirement age and the conditions of employment of elderly workers and of young workers. In Spain, the Constitutional Tribunal has ruled that Additional Provision No. 5 of the Workers' Charter, which sets 69 as the compulsory retirement age, was unconstitutional since it established incapacity for work from a predetermined age, and imposed immediate and unconditional termination of the employment relationship at that age.<sup>219</sup> In Czechoslovakia, the Government indicated in its report that section 20 of the Social Security Act of 12 November 1975<sup>220</sup> lays down that employees who have fulfilled the qualifying conditions for an old-age pension may continue to work in accordance with their physical and mental capacities. Organisations (enterprises), acting in co-operation with the works committees of the basic organisations of the trade union movement, shall make suitable arrangements, having regard to the requirements of the national economy, for the continued employment of employees who do not avail themselves of their right to retire on a pension but decide to continue working even after they become entitled to an old-age pension. Production and unified agricultural co-operatives have a similar obligation towards their members. Workers who have not yet drawn a retirement or invalidity pension have their pension benefits increased by a considerable proportion as a result of their longer period of employment. In the United States, legislation has been adopted with the aim of prohibiting discrimination in employment on the basis of age,<sup>221</sup> with a view to resolving several phenomena of varying importance affecting older workers: higher rates of unemployment than for young workers and particularly of long-term unemployment; the setting of arbitrary age-limits; "the existence, in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." The Act applies to private employers with more than 20 employees, public employers, trade unions and employment agencies, and is restricted to

<sup>219</sup> See, RCE 1984, p. 267; Constitutional Tribunal, ruling of 2 July 1981.

<sup>220</sup> LS 1975-Cz. 3.

<sup>221</sup> Age Discrimination in Employment Act of 1967, LS 1967-USA 1. In its 1967 form, the Act did not apply to employment with federal, state or municipal authorities. In 1974, Congress extended the scope of the Act to these categories of employers. In a new amendment in 1982, the objectives of the Act were once again specified: promotion of employment for the elderly on the basis of their capacities rather than their age; prohibition of arbitrary discrimination in respect of employment on the basis of age; assistance to employers and workers to find the means of resolving problems arising from the the impact of age on employment.

persons who are over 40 years of age.<sup>222</sup> An employer may discriminate based on age in cases where the employer can prove that age is an occupational requirement justified by the nature of the job, although exclusively economic reasons do not constitute a justification.<sup>223</sup> The exception of bona fide occupational requirements has been raised in a series of occupations for reasons involving the safety or health of the worker or of third parties: airline pilots, fire-fighters, police officers, bus drivers and school bus drivers, etc. Nevertheless, in the absence of proof of the impact of age on safety, the courts more recently have been less inclined to automatically consider age to be a bona fide occupational requirement in categories of employment where safety considerations are paramount. The Supreme Court has ruled that it was incorrect for courts to consider the age of 55 as being established as the compulsory retirement age for all fire-fighters merely because Congress had envisaged that federal fire-fighters should retire at the age of 55.<sup>224</sup> A compulsory retirement age has been abolished in the legislation of many of the states of the United States for almost all jobs in the public sector. In France, an amendment to the Labour Code provides that clauses in collective agreements, or contracts of employment providing for the automatic termination of contracts of employment when the employee reaches a determined age or is entitled to draw a retirement pension shall be considered to be null and void.<sup>225</sup> In several countries, the possibility of abolishing a

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<sup>222</sup> In some States, the legislation goes beyond the protection afforded by the Federal Act and protects persons under the age of 40; see, for example, New York, Human Rights Law, s. 296-3(a), which forbids discrimination in employment with regard to persons aged 18 and over; Massachusetts, Wisconsin, 1984, abolition of the upper age-limit.

<sup>223</sup> E.E.O.C. v. City of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), cert. denied, 104 S.Ct. 1030 (1984); E.E.O.C. v. City of Altoona, 723 F.2d 4 (3rd Cir. 1983), cert. denied, 104 S.Ct. 2386 (1984); an employer may not discriminate against an older person on the grounds that employment of a younger person would signify lower wage costs.

<sup>224</sup> Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 (1985).

<sup>225</sup> Section L.122-14-12 of the Labour Code, as amended by the Act of 30 July 1987. In accordance with the circular of the Minister of Labour, dated 8 September 1987, "cut-off" clauses, imposing the automatic termination of employment contracts at a certain age, which are included in collective agreements for public enterprises and public industrial and commercial establishments, and which apply to non-permanent staff, are null and void. Clauses contained in the rules governing employment, however, remain lawful.

compulsory retirement age has been examined.<sup>226</sup> There is a tendency in these countries for there to be less coincidence between the compulsory retirement age and the qualifying age for retirement benefits, in the face of more flexible forms of terminating the employment relationship which do not bring into question the right to draw a retirement pension.<sup>227</sup>

### Trade union membership

74. With regard to discrimination that might arise as a result of an individual's membership or non-membership in a trade union, it should be noted that no specific clause concerning the right to establish or join trade unions or to participate in trade union activities was included in the Convention, in order to avoid duplication of the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which recognises these rights for all workers and employers "without distinction whatsoever".<sup>228</sup> By providing that each Member "undertakes [...] to seek the co-operation of employers' and workers' organisations [...] in promoting the acceptance and observance" of the policy to promote equality, Article 3(a) of Convention No. 111 recognises that a State could not undertake the activities in question while at the same time permitting or countenancing discrimination in the field of trade union rights. One of the aspects of the co-operation that is sought is based on the elimination of

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<sup>226</sup> Australia; Canada, Canadian Human Rights Commission, Annual Report 1979, "... the practice of mandatory retirement should no longer be excluded from the discriminatory practices proscribed by our legislation (Canadian Human Rights Act). The possibility would still remain for employers to claim a bona fide occupational requirement under s. 14(a) if it could be established that workers above a certain age could not carry out the functions of a particular position - but age should not arbitrarily be used as a criterion with the result that capable persons who desire to work are denied employment on the basis of their age alone." pp. 6-7; in its Annual Report 1986, the Commission asked "the Federal Court of Appeal for a determination as to whether section 14(c) of the (Canadian Human Rights) Act contravenes section 15 of the Charter of Rights and Freedoms. If it does, this section will no longer have any force or effect", p. 8.

<sup>227</sup> See the Older Workers Recommendation, 1980 (No. 162).

<sup>228</sup> See International Labour Conference, 69th Session, 1983, Freedom of Association and Collective Bargaining, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Chapter III - Right of Workers and Employers, Without Distinction Whatsoever, to Establish Organisations.

discriminatory practices by trade unions in the admission and retention of members, in trade union activities, etc.<sup>229</sup>

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75. Two members of the Committee, Mr. S. Ivanov and Mr. A. Gubinski, expressed their opinions as to the application of Convention No. 111 and Recommendation No. 111. In their view, in today's world, characterised by the existence of very different political and legal systems, it is important when examining questions of the application of international labour Conventions and Recommendations in law and practice to take real account of the concrete socio-economic conditions in each country and of the social factor. These conditions in the end are the basis for the establishment of a certain type of law, with its own institutions and legal standards. It is important to take account of concrete socio-economic conditions in examining civic and penal relations, amongst others, but above all in examining labour relations, since that is where the social factor makes itself felt most.

In this regard, the Committee refers to the indications provided below in paragraph 160 of the present Survey.

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<sup>229</sup> See below, Chapter II, Section 2, and Chapter IV, Section 2, Subsection 2.

## CHAPTER II

### **SUBSTANTIVE FIELD OF APPLICATION OF THE CONVENTION: ACCESS TO TRAINING, OCCUPATION AND EMPLOYMENT, TERMS AND CONDITIONS OF EMPLOYMENT**

#### General

76. Article 1, paragraph 3, of the Convention provides that "the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment". According to the terms of this definition, the protection provided for in the Convention is not only applicable to the treatment accorded to a person who has already gained access to employment or to an occupation but is extended expressly to the possibilities of gaining access to employment or to the occupation. It covers also access to training, for without such access any real possibility of entering an employment or occupation would be nugatory, inasmuch as training is the key to the promotion of equality of opportunities. The Recommendation contains provisions illustrating these ideas more specifically. Pursuant to Paragraph 2(b) -

all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of:

- (i) access to vocational guidance and placement services;
- (ii) access to training and employment of their own choice on the basis of individual suitability for such training or employment;
- (iii) advancement in accordance with their individual character, experience, ability and diligence;
- (iv) security of tenure of employment;
- (v) remuneration for work of equal value;
- (vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment.

Paragraph 2(d) of the Recommendation states that employers should not practise or countenance discrimination "in engaging or training any person for employment, in advancing or retraining such person in employment, or in fixing terms and conditions of employment". Under Article 3 of the Convention the authorities are to apply, in all their activities, an employment policy free of all discrimination and to ensure the application of the principles of non-discrimination in respect of employment under the direct control of a national authority and in the activities of the training services under the direction of

a national authority. They are under a duty to promote the application of these principles in other sectors of activity. Equality of opportunity and of treatment, without discrimination, as regards access to education and to employment or to an occupation may be recognised by the law as a right which each individual can enforce by judicial proceedings.<sup>1</sup>

## Section 1. Access to training and vocational guidance

### Training

77. Training and vocational guidance<sup>2</sup> are of paramount importance in that they determine the actual possibilities of gaining access to employment and occupations. Discriminatory practices in the matter of access to training are subsequently perpetuated and aggravated in employment and in occupations. In so far as training is a kind of economic investment with a view to future productivity, the fact that certain persons are debarred from training on discriminatory grounds means that society as a whole is denied an important growth potential.

78. In an earlier general survey the Committee had already expressed the view that "Since the 1958 instruments cover all forms of employment and occupations, the words 'vocational training' should by no means be interpreted exclusively in a narrow sense such as apprenticeship and technical education [...] In so far as the completion of certain studies coming under the heading of general education is necessary to obtain access to any given employment or occupation, or to some specialised form of vocational training, the problems relating thereto should not be overlooked in the application of the 1958 instruments [...]".<sup>3</sup> Where the population as a whole

<sup>1</sup> For an example of the recognition of this right in the labour legislation see Comoros, s. 2 of the Labour Code.

<sup>2</sup> The Development of Human Resources Recommendation (No. 150), 1975 defines (in Paragraph 2) the expression "vocational training" as follows: "(1) ... the qualification of the terms 'guidance' and 'training' by the term 'vocational' means that guidance and training are directed to identifying and developing human capabilities for a productive and satisfying working life and, in conjunction with the different forms of education, to improve the ability of the individual to understand and, individually or collectively, to influence working conditions and the social environment. (2) The definition [above] applies to guidance, to initial and further training, and to retraining, whatever the way in which they are provided and whatever the level of skill and responsibility." The Vocational Training Recommendation (No. 117), 1962 defines the scope of its application in the following terms: "all training designed to prepare or retrain any person for initial or later employment or promotion in any branch of economic activity, including such general, vocational and technical education as may be necessary to that end".

<sup>3</sup> General Survey 1963, para. 33.



cannot benefit from general training, a part of the population is unable to acquire more specialised training and to hold jobs that are as productive as possible. Similarly, discriminatory practices affecting access to training or the quality of training will be perpetuated or aggravated in cases where persons who have suffered such discrimination compete for places in the systems of vocational training and, consequently, in employment and occupations. The use of standards of general education that differentiate between men and women, as is the practice in some countries,<sup>4</sup> very soon leads to discriminatory practices based on sex. A point worth noting in this context is that the institution of compulsory and free primary education for all is one of the fundamental elements of a policy of equality of opportunity and treatment in employment and occupation, as is recognised by the majority of countries, whatever their level of development. The reports communicated by many countries give full particulars of the system of general education,<sup>5</sup> of the difficulties experienced owing, e.g. to the economic situation, and of progress made as regards equality of opportunity and treatment in the matter of access to training, including literacy, without discrimination based on sex, race, national extraction or social origin. From the information given in these reports it appears that in many countries equality of access to training is considered a condition of access to employment and to an occupation. In many countries in the African continent considerable efforts have been made to enable girls to make up for part of the accumulated lag in school attendance.<sup>6</sup> Less full information is available about the other grounds of discrimination - political opinion and religion - referred to in Article 1, paragraph 1(a), of the Convention. A number of countries have reported, in addition, on measures taken in the matter of access to education in

<sup>4</sup> See e.g. Pakistan: The Government's report to the Fourth Consultation of Member States on the Implementation of the Convention and Recommendation against Discrimination in Education, UNESCO, General Conference, 33rd Session, Sofia, 1985, 23 C/72, Annex D, p. 259: "Since Purdah-observing girls have little possibilities to benefit from primary education, a new structure known as Mohalla school has been introduced where general education is provided together with teaching of selected home management skills, such as embroidery".

<sup>5</sup> Comparative figures concerning school attendance of boys and girls, including data concerning differences in school enrolment as between the two sexes, have been communicated by a few governments in their reports. For example, in Tunisia girls accounted for only 28.7 per cent of pupils enrolled in schools in 1955-56 and for 40.3 per cent in 1978-79, the proportion rising to 42.5 per cent in the 1983-84 school year. During the same period the number of girls enrolled in schools increased elevenfold, that of boys sixfold.

<sup>6</sup> The rate of school enrolment of females in five French-speaking countries of Africa has risen as follows: in Cameroon from 35.5 per cent in 1960-61 to 45.55 per cent in 1981-82, in Côte d'Ivoire from 25.8 to 45 per cent, in Madagascar from 43.49 per cent in 1975-76 to 49.03 per cent in 1981-82, in Senegal from 32 to 40 per cent, and in Togo from 25.8 to 39.18 per cent.

order to combat the phenomenon of segregation in occupations on the basis of sex or race.<sup>7</sup>

79. A large number of constitutional and legislative provisions and regulations have been adopted with a view to ensuring the implementation of the principle of equality of access to training. Some of these provisions, which are generally embodied in the Constitution of the State concerned, prohibit discrimination on various grounds; these grounds may be narrower than those mentioned in the Convention, and in many cases the relevant provisions are applicable to citizens only.<sup>8</sup>

80. The specific enactments adopted concerning training can be divided into those intended to govern education,<sup>9</sup> which contain, *inter alia*, provisions concerning equality of access, and enactments for giving effect to equality of opportunity and treatment which contain, *inter alia*, provisions for ensuring this equality in education and training.<sup>10</sup> The enactments dealing with education cover, as a

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<sup>7</sup> Paragraph 45 of the Development of Human Resources Recommendation, 1975 (No. 150) provides that measures should be taken to provide effective and adequate vocational guidance and vocational training for particular groups of the population so that they will enjoy equality in employment and improved integration into society and the economy. The persons to whom such special measures should be applicable include persons who have never been to school or who left school early, older workers, members of linguistic and other minority groups, handicapped and disabled persons. See also Panama: Under art. 102 of the Constitution, the State is to carry out programmes for educating and fostering indigenous groups who possess their own cultural models, in order to promote their participation as active citizens.

<sup>8</sup> Guatemala, art. 71 of the Constitution; Guyana, art. 29 of the Constitution; Nicaragua, art. 121 of the Constitution. See a contrario: Algeria, art. 66 of the Constitution ("The State ensures equal access for all to education ..."); El Salvador, art. 58 of the 1983 Constitution ("No educational establishment may refuse admission to pupils by reason of the nature of the union of their parents or guardians or on grounds of social, religious, racial or political differences"); Hungary, section 3 of the Education Act 1985 (right to education for all).

<sup>9</sup> Ghana, Education Act No. 87 of 1961; Nepal, s. 8 of the Act of 1971 concerning the University of Tribhuvan; Spain, Basic Act of 3 July 1985 concerning the right to education; Trinidad and Tobago, s. 7 of the Education Act No. 1 of 1966 as amended (ch. 39.01); USSR, s. 4 of the Fundamental Principles of the Legislation of the USSR and of the Union Republics concerning Public Education, dated 19 July 1973; United States, Title IX of the 1972 Amendments to the Education Act; Venezuela, s. 6 of the Basic Education Act; Zambia, s. 21 of the Vocational Training Act, No. 37, 1972, LS 1972-Zam. 1.

<sup>10</sup> Canada, s. 13 of the Code of Human Rights of Saskatchewan; Finland, s. 5 of the Act of 1986 concerning equality between women and men; Iceland, s. 8 of the Equal Status and Equal Rights of Women and Men Act, No. 65 of 1985.



general rule, a broader range of grounds of discrimination<sup>11</sup> than those concerning equality of opportunity and of treatment, where in many cases the sole grounds mentioned are sex or race.<sup>12</sup> The scope of these provisions varies greatly: in some cases one and the same law expressly prohibits discrimination in the entire system of education, including in training that may be provided in and by the enterprise. In other cases, the provisions enacted cover only training provided at enterprise level, the general provisions concerning the equality of citizens before the law being considered as sufficient to cover training provided outside the enterprise. In the United Kingdom the legislation enacted for combating discrimination on the basis of sex or race prohibit discrimination on either of these grounds by the employer, by vocational training bodies outside the enterprise and by bodies responsible for educational establishments, such as educational establishments administered by a local education authority, independent schools, universities, and such establishments providing full-time or part-time education as may be designated by order.<sup>13</sup> Practical difficulties may arise in cases where the authorities responsible for carrying into effect the policy of promoting equality in education are not the same as those responsible

<sup>11</sup> Ghana, Act cited above (religion, nationality, race, language); Nepal, Act cited above (religious or other beliefs, sex, race, membership in a tribe or caste); Trinidad and Tobago, Act cited above (religious beliefs, race, social status, language); Zambia, Act cited above, s. 21 (sex, race, tribe, place of origin, colour, creed).

<sup>12</sup> Australia, Sex Discrimination Act, 1984, s. 21; Belgium, Economic Reform Act of 4 August 1978, Title V - Equality of treatment as between men and women in matters relating to conditions of employment and access to employment, vocational training, promotion and self-employment opportunities, ss. 124 and 125, LS 1978-Bel. 2; Denmark, Act No. 161 of 12 April 1978 respecting equality of treatment as between men and women with regard to employment, s. 3, LS 1978-Den. 3; Finland, Act of 1986 concerning equality of treatment as between women and men, s. 5; France, s. 900-4 of the Labour Code, see LS 1983-Fr. 2; Ireland, Employment Equality Act, 1977, s. 6, LS 1977-Ire. 1; Japan, Law No. 113 of 16 June 1972 concerning improved welfare measures for women workers and including the guarantee of equality of opportunity and treatment as between men and women in employment, as amended in 1985, Ch. II, s. 9, LS 1985-Jap. 1; Luxembourg, Act of 8 December 1981 respecting equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, s. 4, LS 1981-Lux. 1; Netherlands, Act of 1 March 1980 concerning equal treatment for men and women, s. 4(2), LS 1980-Neth. 2; Norway, Act. No. 45 of 9 June 1978 concerning equality of the sexes, as amended, s. 6; United Kingdom, Sex Discrimination Act, 1975, s. 14 (vocational training bodies) and ss. 22 to 28 (discrimination in education), LS 1975-UK 1; idem, Race Relations Act, 1976, s. 13 (vocational training bodies) and ss. 17 to 19 (discrimination in education), LS 1976-UK 2.

<sup>13</sup> The 1975 and 1976 Acts referred to earlier. See also Norway, ss. 6 and 7 of Act No. 45 (cited previously) on equality of the sexes.

for combating discrimination in employment. Paragraph 10 of the Recommendation states that close and continuous co-operation should be established between the bodies concerned in order that measures taken to achieve the desired objective may be co-ordinated. In view of the acknowledged importance of training for the implementation of a policy of equality of opportunity and treatment in employment and occupation, co-operation between these different bodies should be strongly encouraged. In Sweden the authorities concerned with the labour market have a duty to co-operate - in the context of the policy of promoting equality of opportunity as between men and women and of combating occupational segregation - with the authorities responsible for education and social affairs and with specific bodies.<sup>14</sup> Training, whether vocational or of a general nature, necessarily involves joint action by various sectors of activities and by a number of partners; for the sake of illustration one may mention the bodies set up in many countries for the purpose of working out, proposing and even co-ordinating a training policy consistent with the employment situation or with development plans.<sup>15</sup> It would be desirable that the functions of these bodies, where they exist, should be enlarged to cover the co-ordination of anti-discrimination measures. The reports received contain very little information on the application of this provision of the Recommendation.

81. The subject of access to training without discrimination based on any of the grounds mentioned in the instruments of 1958 is of great importance. In practice, discrimination in the matter of training may take the form either of rejecting or deliberately omitting to accept a person's application to be admitted as a pupil, student or trainee, or else of laying down conditions governing admission which lead to the exclusion of candidates on grounds referred to in the Convention. It appears from information contained in the report of the Secretary-General of the United Nations submitted to the Commission on Human Rights at its 39th Session<sup>16</sup> that in the

<sup>14</sup> Section 11 of the Regulations of 1987 concerning employment promotion measures.

<sup>15</sup> The acceptance and application of the government's non-discrimination policy might be greatly facilitated if these bodies were of tripartite membership. See Peru: Presidential Decree No. 012-87-TR of 17 July 1987 to establish the Special Vocational Training Commission: "The tripartite nature of the composition of the Special Commission with the participation of representatives of employers' and workers' organisations will make it possible to take significant measures in the matter of vocational training."

<sup>16</sup> Islamic Republic of Iran: Some pupils and students were reportedly sent away because of their religious belief, though children or students already attending educational establishments could stay provided that they renounced their faith. The Economic and Social Council's report on the human rights situation in the Islamic Republic of Iran submitted to the General Assembly at its 42nd Session quotes the replies of the university authorities to requests for an explanation by students who had been prevented from continuing their (footnote continued on next page)

## EQUALITY IN EMPLOYMENT AND OCCUPATION

Islamic Republic of Iran children professing a certain faith were unable to gain admission into the educational system. In Chile persons who take part in party political activities and who have been punished by the authorities concerned may not register in certain universities even if they fulfil all the other qualifying conditions for becoming students in those universities.<sup>17</sup> In Poland temporary provisions have been enacted which make provision for the suspension of a student's rights in cases where the student has committed a wrongful act causing serious harm to society or an act prejudicial to the higher interests of the Republic. In especially serious cases the student concerned may be struck off the register of students, with all the consequences involved by debarment from studies.<sup>18</sup> In Malaysia provisions are in force which forbid students to be members of or to join associations, political parties, trade unions or any other kind of grouping; students who commit a breach of these provisions are liable to a fine and to imprisonment, and if sentenced to imprisonment, they are automatically excluded from the university.<sup>19</sup> The Committee has asked several countries for particulars of certain conditions governing access to training (other than the conditions requiring the possession of diplomas or degrees) in order to satisfy

(footnote continued from previous page)

studies: "In reply to the letter dated ... with regard to the reason for preventing you to continue education, this is to inform you, that as announced by the Ministry of Culture and Higher Education, because of your being a member of the misled sect of Baha'ism, your admission is not possible according to paragraph 1, article 11, of the Ministry's directions." Doc. E/CN.4/1983/19. The daughter of another person produced a similar document which attested that "... according to the order of Karaj Ministry of Education, since Baha'i is not recognised as an official religion, she cannot continue her education at the Islamic educational centre. Since the above-mentioned student is a professional Baha'i and believer in Baha'ism, her dossier has been submitted to her." (A/42/648, para. 25.) The report adds the following remark: "Baha'i children at primary and secondary levels were reportedly gradually being readmitted to school, but were allegedly being subjected to constant pressure and indoctrination and to threats of being prevented from taking their examinations unless they renounced their faith. Admission to universities and other institutions of higher education was allegedly forbidden to Baha'is." (ibid., para. 35.)

<sup>17</sup> Legislative Decree No. 149 (Rules and Regulations of the University of Santiago de Chile), s. 35.

<sup>18</sup> Act No. 176 of 21 July 1983 establishing a special legal regime for the period of action to deal with the socio-economic crisis (operative until 31 December 1985). s. 13(3). The Act makes provision also for measures applying to workers who have been dismissed without notice, so far as their access to employment is concerned (s. 3) and to teachers "whose activities are manifestly incompatible with the law" (s. 14).

<sup>19</sup> Section 15 of the Act of 1971 concerning universities and university colleges, as amended by the Act of 1975.

itself that these requirements do not lead to discrimination based on prohibited grounds. In some cases the provisions concerning the award of university degrees stipulate, among the qualifying conditions, political or ideological conditions; such conditions are not compatible with the Convention since the academic qualifications in question give access to a broad range of occupations the performance of which does not require - as an intrinsic condition attaching to the work - the possession of the political or ideological qualifications demanded of the candidates.<sup>20</sup> With respect to the application of the Convention in another country that has ratified the instrument, the Committee has expressed the view that a number of the criteria included in the conditions for access to, and for success in, advanced education and training (in so far as they refer to political outlook, partisan conduct, or the achievements of parents in building socialism) as well as the role assigned in evaluating fulfilment of these criteria to an organisation responsible for implementing the objectives of a political party, are not consistent with a policy designed to eliminate any discrimination on the basis of political opinion or social origin.<sup>21</sup>

82. Discriminatory practices in respect of access to training rarely originate in legislative provisions or regulations that are expressly of a discriminatory nature; more commonly they arise out of practices that are based on stereotypes affecting mainly women or certain disadvantaged or minority groups of society. In this respect, the positive measures taken to give effect to the national policy referred to in Article 2 of the Convention assume special importance. They make it possible to rectify the de facto inequalities affecting members of groups that are at a disadvantage owing to the phenomenon of occupational segregation, in particular such segregation based on

<sup>20</sup> See e.g. Cuba: Children's and Young People's Code, adopted by Act No. 16 of 28 June 1978 (ss. 23, 24 and 26(2)). Decisions of the Ministry of Education Nos. 512 of 3 December 1982 (as amended by Decision No. 385 of 18 August 1983), 568 of 21 September 1981, 58 of 6 February 1981, 234 of 12 June 1982 and 300 of 11 June 1985; decisions of the Ministry of Higher Education Nos. 193 of 5 July 1982, 250 of 31 July 1981, 327 of 9 November 1982 and 4 of 15 July 1980 in so far as these provisions require candidates to satisfy specified political and moral criteria or to satisfy the politico-ideological conditions prescribed by the directives of the secretariat of the Central Committee of the Communist Party of Cuba dated 26 October 1977 for the application of the policy concerning the award of scientific degrees; disciplinary regulations applicable to students in institutions of higher education, approved by Decision No. 480 of the Ministry of Higher Education dated 16 November 1980. USSR: Methodological directives for verifying the quality of the various types of basic education in the institutions of higher education of the USSR, approved by the State Inspectorate of institutions of higher education on 2 October 1978, and procedure for the award of academic diplomas and degrees adopted by decree of the Council of Ministers of the USSR dated 29 December 1975.

<sup>21</sup> German Democratic Republic: RCE 1987, p. 362.

sex. A number of reports refer, however, to evidence showing that, in the application of the Convention, allowance is made for sex-based segregation in training, which is reflected in the tendency of persons of the one or the other sex to undertake a course of studies or training that leads to a type of employment or occupation in which persons of the sex in question predominate.<sup>22</sup> According to information communicated to the Committee by a few governments, various programmes of instruction or training tend to guide boys and girls towards different occupations; action is to be taken to remedy this state of affairs. In a great many countries, the number of girls entering courses of vocational instruction is smaller than that of boys. In addition, these vocational training programmes are characterised by a pronounced segregation of the sexes and are very influential in guiding men and women towards different types of employment. According to a report prepared by the government of a European country that has ratified the Convention,<sup>23</sup> the occupational segregation is perhaps attributable to the structure of training rather than to differences in qualifications. In its report the Government of Canada stated that equality between men and women in training implied changes in the programmes and in educational policies with a view to promoting a positive attitude with respect to the abilities and aspirations of women.

83. The consequences of sex-based segregation in occupations are especially noticeable in apprenticeship. One government states in its report that the balance between boys and girls which exists in general education is lacking in vocational training, and particularly in apprenticeship, for a large number of firms still offer places to boys only.<sup>24</sup> In view of the importance of apprenticeship in very many countries, special attention ought to be given to measures for encouraging firms to recruit apprentices regardless of sex or

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<sup>22</sup> Ireland: Without prejudice to the maintenance of the status quo, s. 15 of the 1977 Act (referred to earlier) allows some latitude for corrective action: "Nothing in this Act shall make it unlawful for any person to arrange for or provide training for persons of a particular sex in a type, form or category of work in which either no, or an insignificant number of, persons of that sex had been engaged in the period of 12 months ending at the commencement of the training, or to encourage persons of that sex to take advantage of opportunities for doing such work." Portugal: Circular No. 11/CD/85 of the Institute for Employment and Vocational Training.

<sup>23</sup> Denmark: Report on the Employment of Women, Conference on the Employment of Women, Paris, 1980.

<sup>24</sup> Federal Republic of Germany: The Government reports that the proportion accounted for by female apprentices was 35.3 per cent in 1970 and 40.6 per cent in 1985. Between 1977 and 1985 the number of women entering training courses combined with employment increased by 45.8 per cent, whereas the number of men increased by only 22.6 per cent. The situation is much the same in many other countries: employers tend to recruit, whether as apprentices or as appointees to a first job in an employment relationship, young men in preference to young women of the same age and with the same qualifications.

apprentices of one sex to be trained in occupations traditionally performed by persons of the other sex.

84. The promotion of equality of opportunity and of treatment in respect of training applies likewise in the actual process of training. For example, some provisions specify that it is forbidden to terminate the training on discriminatory grounds, which are spelt out in these provisions, while other provisions declare it unlawful to refuse or to curtail deliberately to a person who is a pupil in an educational establishment any benefits, facilities or services to which that person is entitled.<sup>25</sup> In one country which has ratified the Convention the authorities may order a student to be expelled on account of events that have occurred outside the university in cases where these events have become the subject of judicial proceedings as a result of complaints or of a summons to appear in court issued in pursuance of the Act concerning the security of the State and where a judicial decision is to be rendered and enforced. The offences referred to in the said Act include the unauthorised call for public assemblies in public thoroughfares and incitement to any other form of demonstration tending to facilitate or make possible a disturbance of the public peace.<sup>26</sup>

#### Vocational guidance

85. As a general rule, it is the purpose of vocational guidance<sup>27</sup> to offer to young persons, or to persons who may need it, special assistance in choosing an occupation, for which purpose a number of methods are used, such as the dissemination of information about occupations, the preparation of recommendations in the light of personal aptitudes and social needs, the joint participation of teachers and parents in fostering the children's choice of an occupation.<sup>28</sup> Vocational guidance is intended to play an important

<sup>25</sup> See e.g. United Kingdom, 1975 Act, s. 22.

<sup>26</sup> Chile, Act No. 12.927 concerning the security of the State, and university Decree No. 003340 of 13 September 1984 making disciplinary regulations applicable to the students of the University of Chile, s. 9(2); the Committee has pointed out, with reference to the said Act, that the protection against discrimination based on political opinion implies that the scope of the Convention covers the expression of opposition to established political principles that falls short of the use of or incitement to violence.

<sup>27</sup> The Vocational Guidance Recommendation, 1949 (No. 87) gives the following definition: the term "vocational guidance" means assistance given to an individual in solving problems related to occupational choice and progress with due regard for the individual's characteristics and their relation to occupational opportunity. Vocational guidance is based on the free and voluntary choice of the individual; its primary object is to give him or her full opportunity for personal development and satisfaction from work, with due regard for the most effective use of national manpower resources.

<sup>28</sup> See e.g. USSR, ss. 2.1 and 2.2 of the regulations governing the territorial vocational guidance centres for young persons.



part in opening a broad range of occupations free of considerations based on stereotypes or archaic conceptions according to which specific trades or occupations are supposedly reserved for persons of a particular sex, and so to promote a genuine policy of equality of opportunities. The provisions of the Human Resources Development Recommendation, 1975 (No. 150), which recommends, inter alia, the implementation of vocational guidance programmes compatible with the right to free choice of an occupational activity and to fair chances of promotion, without any discrimination whatsoever, provide an appropriate framework for the establishment of a system of vocational guidance consistent with this criterion.<sup>29</sup> Two points stand out in the (not very copious) information available: the establishment of systems of information designed to broaden the scope of choices of occupations for girls and boys, and the importance attached to guidance tests in the choice of a trade or occupation. As regards the first point, the admission of girls - for in practice it is mainly girls who are concerned - to technical training courses makes it possible to enhance their occupational opportunities, and for this purpose action is needed with respect both to motivation and to the offer of training possibilities. Several countries have reported that measures had been taken to encourage women and girls to think also of entering training courses leading to occupations traditionally regarded as male occupations.<sup>30</sup> The Nordic Council has initiated a

<sup>29</sup> According to Paragraph 11(b) of the Recommendation, Members whose vocational guidance programmes are in the early stages of development should aim at assisting those groups of the population which require help in overcoming traditional restrictions on their free choice of education, vocational training or occupation. Paragraph 54(2)(c) provides that measures should be taken to promote equality of access for girls and women to all streams of education and to vocational training for all types of occupations, including those which have been traditionally accessible only to boys and men, subject to the provisions of international labour Conventions and Recommendations.

<sup>30</sup> Australia: The project undertaken by the Commonwealth and Western Australian governments involves sending women working in non-traditional occupations to towns throughout the country to talk to schools and community groups about their apprenticeship and job experience. ILO: Social and Labour Bulletin, 1/87, p. 167. See also Norway: "Information project" launched in two counties. In its report the Government states that the power of examples can be very important in future guidance. Denmark: Introductory work experience courses are intended to provide a firm basis for the choice of occupations both in sectors where women are traditionally represented and in those where they are not. A publicity drive to urge girls to take up occupations traditionally chosen by men uses the slogan "Women should stop being trained for unemployment". Iceland: s. 10 of the Equal Status and Equal Rights of Women and Men Act, No. 65/1985, provides that in giving information about educational and training opportunities schools should endeavour to change the traditional choice of employment and education as between men and women.

project (BRYT) comprising a broad range of activities for the purpose of devising and evaluating methods of breaking down the male-female division of the labour market.<sup>31</sup> As regards vocational guidance tests, Recommendation No. 150 provides in its Paragraph 13 that appropriate tests of capacity and aptitude - including both physiological and psychological characteristics - and other methods of examination should be made available for use in vocational guidance. Without underestimating the value and usefulness of these tests, one should not forget that their results are valid only in the theoretical context in which they were obtained and through which they are interpreted. So far as the selection is concerned, the tests administered to determine aptitude for entry into the training systems should bear a genuine and reasonable relationship to the type of training to be provided and to the activity eventually to be performed by the candidate. The tests should not perpetuate past discriminatory practices by stressing social, cultural or linguistic characteristics that are not germane to the qualifications required for a particular job. Hence, the tests should form the subject of a reappraisal in order to eliminate from the theoretical context any features that might lead to indirect discrimination based e.g. on sex or social origin.

## Section 2. Access to occupation and employment

86. The Convention refers to the promotion of equality and treatment in respect of employment and occupation. During the early stages of the discussion of the text by the International Labour Conference, an amendment to delete the reference to occupation had been submitted by some governments. The intention of the sponsors of the amendment was to ensure that the instrument should not apply to independent employment<sup>32</sup> - which had been expressly mentioned in the report by the Office. The amendment was eventually rejected. It was pointed out that it would hardly seem right for a Convention to deal solely with the elimination of discrimination in access to wage-earning employment and not to give to workers wishing to be self-employed any protection against laws, regulations or practices

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<sup>31</sup> The Governments of Iceland and Norway refer to national projects undertaken in this context. Iceland: Girls have been encouraged to try new occupational areas and to acquire professional skills in areas of industry and technology where they currently constitute the majority of the unskilled labour force.

<sup>32</sup> The concept of "independent occupation" may cover - according to the country concerned and depending on the diversity of economic and social systems - a more or less broad field of activity the primary common feature is, as a rule, that the worker's activity is not under the control of an employer to whom he or she is bound by a contract of employment or by virtue of his or her status as an official.



arbitrarily preventing them from doing so.<sup>33</sup> In an appendix to the report prepared for the second debate on the Convention by the Conference the Office explained the significance of the words "employment and occupation".<sup>34</sup> It referred specifically to the Seventh and Eighth International Conferences of Labour Statisticians. These Conferences had interpreted the word "occupation" to mean the trade, profession or type of work performed by the individual, irrespective of the branch of economic activity to which he is attached or of his industrial status. They had further decided that "persons in employment" included all persons above a specified age who were "at work" and that the phrase "at work" included not only persons whose status was that of employee but also those whose status was that of "worker on own account", "employer" or "unpaid family worker". In its note the Office concluded that at the international level both words had a comprehensive meaning. At the Conference's 42nd Session, in 1958, an amendment submitted, like the earlier one, to exclude independent workers from the scope of the Convention was rejected.<sup>35</sup>

87. Under some legislative provisions dealing with the prohibition of discrimination the occupational scope of the prohibition is narrower than that of the Convention in that they exclude workers in certain sectors of activity from the benefit of the guarantees against discriminatory practices in employment. In Norway persons in the service of the civil aviation undertakings and certain workers in agricultural and forestry undertakings have recently become eligible for the benefit of the guarantees offered by the Working Environment Act.<sup>36</sup> The only activities still not covered by the said Act are shipping, hunting and fishing (including the processing of catches on board ship) and military aviation. In Spain the Workers' Charter, which is the statutory basis of equality of treatment in employment relationships, does not apply to persons whose service is governed by rules applicable to the public service or who are in the service of bodies corporate governed by public law, nor does it apply to certain employment relationships of a "special nature".<sup>37</sup> Similarly, in Rwanda agricultural workers, persons appointed under civil service rules (as well as persons on the same footing) and persons carrying on an independent occupation are not

<sup>33</sup> Record of Proceedings, ILC, 40th Session, Geneva, 1957, Appendix X, Seventh item on the agenda: Discrimination in the field of employment and occupation, paras. 17-19.

<sup>34</sup> ILO: Discrimination in the field of employment and occupation, ILC, 42nd Session, Report IV(1), Appendix.

<sup>35</sup> Record of Proceedings, ILC, 42nd Session, Geneva, 1958, Appendix VI, Fourth item on the agenda: Discrimination in the field of employment and occupation, paras. 15 and 16.

<sup>36</sup> Acts Nos. 57 and 58 amending the Working Environment Act.

<sup>37</sup> Ss. 1(3) and 2 of Act No. 8 to promulgate a Workers' Charter. Since the entry into force of that Charter the principle of equality of treatment has been extended to cover sports professionals (Royal Decree No. 318/1981), commercial agents (Royal Decree No. 2033/1981) and work performed at home on behalf of others (Royal Decree No. 1424/1985).

covered by the Labour Code and hence do not benefit from the protection established by the provisions prohibiting discrimination.<sup>38</sup> The Government has stated that the legislation which was to govern agricultural workers has not yet been enacted but that these workers, and also the other categories of persons mentioned above, are protected by the provisions of the Constitution of Rwanda which forbids all forms of discrimination. While this explanation may satisfy the requirements of the Convention in the matters of equality of treatment to the extent to which the constitutional provisions may be relied upon in court, it is not sufficient to satisfy the requirements of the promotion of equality of opportunity, since the ban on discrimination is not by itself adequate for this purpose. Some provisions for promoting equality of opportunity and treatment apply only to undertakings that employ not less than a specified number of wage earners:<sup>39</sup> these provisions cannot be regarded as giving an employer with fewer than the minimum number of employees a licence to practise discrimination on any of the prohibited grounds but they do leave the employees without protection against possible discrimination against them.<sup>40</sup> An exception to the protection against discrimination based on the number of persons employed is compatible with the Convention only if the exception is of a temporary

<sup>38</sup> Labour Code, ss. 2 and 186, LS 1967-Rwa. 1.

<sup>39</sup> United States, Civil Rights Act, 1964, as amended by the Equal Employment Opportunity Act, 1972, s. 701(b): persons employing fewer than 15 employees, Indian tribes, and tax-exempt private membership clubs do not come within the meaning of the term "employer". Some state legislation has adopted a similar limitation in their own enactments (Texas, Anti-Discrimination Act, 1983), others have specified a lower figure (North Dakota, Human Rights Act, 1983, fixes the limit at ten employees), while others have removed the limitation altogether.

<sup>40</sup> See Council of Europe, Case law relating to the European Social Charter - Supplement No. 2, Strasbourg, 1987, p. 1: "The question of the non-observance of the principle of equal treatment (in the case of employment in private households or in small undertakings with not more than five employees) can also not be regarded as consistent with Article 1, paragraph 2 of the Charter". See also Court of Justice of the European Communities, Judgement of 8 November 1983, Commission of the European Communities v. United Kingdom, Case 165/82: Whilst Article 2(2) of Directive 76/207 allows Member States to exclude from the field of application of the Directive those occupational activities for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor, the fact that a law of a Member State excludes from the prohibition of discrimination between sexes all kinds of employment in private households or in small undertakings with not more than five employees nevertheless goes beyond the objective which may be lawfully pursued within the framework of the provision in question, by reason of the generality of the exclusion.

or transitional nature; it should be dropped as soon as possible<sup>41</sup> and the situation which had given rise to its adoption should be dealt with through measures under Article 3(a) of the Convention.

88. In some other countries<sup>42</sup> the armed forces, the police and prison services do not come within the scope of the legislation governing employment or the Labour Code or are governed by specific enactments that do not provide for measures for ensure the promotion of equality of opportunity and treatment. Some governments<sup>43</sup> have stated that they were considering whether it might be necessary to make specific changes in the general regulations applicable to the public service with a view to ensuring the full application of the principle of non-discrimination in employment and occupation. The Committee has noted with satisfaction that specific provisions had been adopted in some countries in order to extend to the public sector the guarantees already accorded to workers in the private sector.<sup>44</sup> In an earlier survey the Committee has pointed out that the occupational scope of the Convention covers all sectors of activity and applies both to employment in the public sector and to private employment and occupations. Under Article 3(d) States which have ratified the Convention are to pursue the national policy designed to promote equality of opportunity and treatment "in respect of employment under the direct control of a national authority". Under Paragraph 2(c) of the Recommendation "government agencies should apply non-discriminatory policies in all their activities". As regards action by authorities other than those of the central government, Paragraph 3(b) of the Recommendation states that state, provincial or local government departments or agencies and industries and undertakings operated under public ownership or control should be encouraged to ensure the application of the principles of non-discrimination. The instruments of 1958 leave it to the States to determine the nature of the legal relationship of persons employed in the public service, subject to the requirements inherent to each particular employment or occupation, but the adoption of a special form of relationship by a national legal system should not have the consequence of depriving persons subject thereto of the protection provided for by the Convention.<sup>45</sup> Protection against discrimination

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<sup>41</sup> United Kingdom: under s. 6(3) of the 1975 Act, it did not apply to employment for the purposes of a private household nor to undertakings where the number of persons employed does not exceed five; on 7 November 1986 Parliament approved an amendment (Sex Discrimination Act 1986) repealing these exceptions and adding to the notion of "genuine occupational qualification".

<sup>42</sup> Afghanistan, Saudi Arabia, Sierra Leone, Swaziland.

<sup>43</sup> Swaziland.

<sup>44</sup> Australia, RCE 1987, p. 355; Netherlands, RCE 1983, p. 221.

<sup>45</sup> A similar question was considered by the International Labour Office on an earlier occasion in response to a request by a government concerning the application of certain provisions of the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30) to all officials. The government had expressed the view that, owing to their

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in employment and occupation should not be limited by a restrictive definition of employment.<sup>46</sup> No employment and no occupation is excluded from the scope of the Convention, which covers all workers.

#### Access to self-employed occupation

89. The category of non-wage-earning workers - while not very large in the industrialised planned economy countries<sup>47</sup> - accounts in some developing countries for more than 80 per cent of the labour force, the great majority being engaged in the rural sector; the proportion is reversed in the developed market economy countries, where these workers account for 5 to 10 per cent of the labour force. One of the main difficulties is that these persons are covered by the general provisions concerning equality before the law laid down in the constitutions, and that the provisions of the Labour Codes do not apply to their position or are formally restricted to wage earners. As a result, in some cases the protection extended to these workers may be less far-reaching than that granted to wage earners. This category of the labour force - which includes workers from farmers to lawyers as well as artisans in the crafts - is quite heterogeneous, and this heterogeneity is reflected in the great diversity of the practical conditions governing access to these activities.

90. With due allowance for the variety of situations, it is nevertheless possible to discern some common characteristics as regards equality of access to these occupations. In the first place, in practice access to these occupations depends on material conditions: access to land, access to credit, access to the goods and

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special status, officials could not be deemed to be either workers or employees and that consequently they did not come within the scope of the international labour Conventions. In his reply, dated 14 October 1931, Albert Thomas, Director-General of the Office, stated that where a Convention is applicable to persons employed in public undertakings or establishments no distinction was made according to the legal nature of the rules governing their conditions of service. ILO, Official Bulletin, Vol. XVII, 1932, pp. 119-123.

<sup>46</sup> For example, in the United Kingdom, both the Sex Discrimination Act of 1975 and the Equal Pay Act of 1970, LS 1970-UK 1, 1984-UK 1A, define employment as meaning "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour". The Employment Appeal Tribunal held that this definition covered self-employed persons who personally executed work or labour under a contract and was not limited to persons employed under a contract of service. The judgement confirmed that those who engage the talents, skills or labour of the self-employed should ensure that the terms are equal for men and women and do not discriminate between them. Employment Appeal Tribunal, 13 February 1984, Industrial Relations Law Reports, London, 1984, p. 227.

<sup>47</sup> See, e.g., in the USSR, s. 1 of Act No. 6050-XI of 19 November 1986 on individual enterprise contains a definition of this type of activity; see LS 1986-USSR 1.

services necessary for carrying on the occupation in question. Access to these goods and these services without discrimination on any of the grounds mentioned in the Convention is one of the objectives of national policy aimed at promoting equality of opportunity and treatment in employment.<sup>48</sup> In some cases discrimination is the result of rules concerning marital or personal status, as happens for example where the inheritance system excludes certain categories of persons or where the right to enter into contracts is restricted by a condition requiring the permission of a third party. In Honduras unmarried women without dependants may not benefit from the facilities offered by the Agrarian Reform Act for obtaining access to land.<sup>49</sup> In some countries measures have been adopted for facilitating access to land for certain categories of persons.<sup>50</sup> In many countries provisions have been enacted to ensure access to credit<sup>51</sup> or to business premises<sup>52</sup> without discrimination. Under similar provisions discrimination against members of industrial or commercial companies is declared unlawful.<sup>53</sup> In France the Penal Code provides that it is a punishable offence for any private or public person to act or to fail to act in a manner that hampers the carrying on of any economic activity whatsoever on such grounds as sex, race or religion.<sup>54</sup> The

<sup>48</sup> See International Labour Conference, 71st Session, Report VII, Equal Opportunities and Equal Treatment for Men and Women in Employment, Geneva, 1985, p. 11.

<sup>49</sup> Agrarian Reform Act, s. 79a.

<sup>50</sup> See e.g. Australia, 1984 Act cited above, s. 24.

<sup>51</sup> See e.g. Australia, 1984 Act, s. 22, prohibiting discrimination on the basis of sex, marital status or pregnancy as regards access to services; "services" include banking and insurance services and availability of security, loans and credit; Canada: Canadian Charter of Rights and Freedoms, 1982 (discrimination on unlawful grounds: race, national or ethnic origin, colour, religion, sex, age, mental or physical disability), s. 5; United States: Alaska, Human Rights Act, s. 18.80.250; Connecticut, Human Rights Act, ss. 46a-65 and 66; New York, Human Rights Act, s. 296a; South Dakota, Human Relations Act, s. 20.13.21, Washington, Anti-Discrimination Act, ss. 49.60.175 and .176; France, s. 416 of the Penal Code (family status, national origin, sex, moral conduct, actual or alleged belonging to or not belonging to an ethnic or racial group or adhering to a particular religion); United Kingdom, 1975 Act, s. 29 (sex, married persons) and 1976 Act, s. 20 (race, colour, nationality, ethnic or national origin).

<sup>52</sup> See e.g. Canada, Canadian Charter of Rights and Freedoms, s. 6.

<sup>53</sup> Australia, 1984 Act cited above, s. 17; United Kingdom, 1975 Act, ss. 10 and 11.

<sup>54</sup> France, s. 416-1 of the Penal Code (Act No. 85-772 of 25 July 1985). Under this section, it is a punishable offence for anyone, whether by act or omission, to hamper the carrying on of any economic activity whatsoever under conditions that are normal for any individual, by reason of that individual's family status, national

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Committee has noted with satisfaction the information communicated by the Government of Guatemala that certain decrees which had imposed restrictions on the basis of race or national origin for the practice of certain commercial occupations or comparable activities had been made inoperative by the enactment of a provision prohibiting discrimination on these grounds.<sup>55</sup> The Council of the European Communities has adopted a directive requesting its Member States to take the necessary action, by 30 June 1989, in order to eliminate any provisions inconsistent with the principle of equality of treatment for men and women, including any such provisions that deal with the formation, installation or extension of an undertaking or with the initiation or extension of any other kind of activity.<sup>56</sup> From the information given in the reports it is not possible to gauge precisely the extent of the protection which these persons enjoy against discrimination on the grounds mentioned in the Convention as regards access to the various goods and services necessary for the carrying on of an occupation. The Committee considers that fuller particulars should be supplied in this respect.

91. In many countries there are bodies whose members are either elected representatives of the professions,<sup>57</sup> or persons appointed

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origin, sex, moral conduct, actually or allegedly belonging to an ethnic or racial group or adhering to a particular religion, or under conditions that are normal for a body corporate by reason of the character of the members or of some of the members of that body corporate. Under s. 187.2 of the Penal Code the said offence is punishable if committed by a person acting on behalf of a public authority or by a citizen in the performance of a public service; the provisions of these two sections are not applicable if the acts referred to are in conformity with directives issued by the Government in the context of its economic or trade policy or in pursuance of its international commitments.

<sup>55</sup> RCE 1975, p. 164.

<sup>56</sup> EEC, Council Directive of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood. Official Journal of the European Communities, No. L359/56, art. 4. The scope of the Directive covers self-employed workers, viz. any person who carried on, under conditions specified by the national law, any gainful activity for his or her own account, including farmers and the liberal professions, and spouses who are not remunerated and are not partners who participate in the activity in question (art. 2). See also, in the context of co-operation (with developing countries) art. 123 of Title VIII of the Third Lomé Convention under which co-operation supports the efforts of the ACP States, particular attention being given to access by women "to more advanced technology, to credit and to co-operative organisations, and to appropriate technology aimed at alleviating the arduous nature of their tasks".

<sup>57</sup> For example, in France the bar association, the medical association, the society of architects, and like professional bodies.



by the authorities from among members of the profession,<sup>58</sup> or else state officials, which play a part in fixing the conditions governing access to the legal or medical profession and other professions. The laws dealing specifically with equality contain special provisions forbidding these regulatory bodies to practise discrimination.<sup>59</sup> It would be unlawful, for example, for an authority or body which is empowered to grant, renew, prolong, revoke or cancel a licence or qualification necessary for the practice, or for facilitating the practice, of a profession, or for carrying on a business, or for being admitted to an occupation, to discriminate against a person on certain grounds (sex, race, etc.) by refusing, or by failing to grant, to that person the renewal or prolongation of the licence or qualification, by revoking or cancelling the licence or qualification, or to lay down discriminatory conditions governing the grant of the licence or qualification. In Denmark the obligation to respect equality of treatment is owed also by any person who takes measures or decisions related to a person's access to an independent occupation, a provision which covers both the officers of an authority and private persons who may have occasion to grant or withhold any of the facilities, permits, etc. on which access to the occupation is dependent.<sup>60</sup> In other countries the power to grant the licences or permits necessary for the practice of non-wage earning professions or occupations is vested in the authority, which has a duty to act in conformity with the principle of the equality of citizens before the law.<sup>61</sup>

92. Seemingly neutral requirements that govern the possibility of acceding to or carrying on an occupation may involve indirect discrimination based on grounds referred to in the Convention. This is the case where the possession of certain diplomas issued by specified institutions or the fulfilment of special conditions is required in order that a person may be admitted to such varied occupations as those of hairdresser, advocate, medical practitioner and midwife. These requirements, while applied uniformly to all candidates, nevertheless result in debarring certain persons from the

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<sup>58</sup> See e.g. Ghana, s. 42 of the PNDCL Act of 1982 (establishment of a public legal service to which all lawyers must belong, and establishment of a committee of this service with powers to rule on any question of appointment, promotion, discipline, dismissal, etc.).

<sup>59</sup> Australia, *ibid.*, s. 18; New Zealand, s. 21 of the Human Rights Commission Act, 1977; United States, California, s. 12944 of the Fair Employment and Housing Act; United Kingdom, 1975 Act, ss. 12 and 13.

<sup>60</sup> Denmark: s. 5 of the Equality between the Sexes Act, No. 161 of 12 April 1978, which provides "The obligation to observe equality of treatment shall also be incumbent on any person making arrangements or taking decisions in connection with ... vocational training, etc., for such employment [self-employment] or with the conditions in which such employment may be carried on."

<sup>61</sup> See e.g. USSR, ss. 3, 6 and 7 of Act No. 6050-XI cited above.

occupation in question on grounds of national extraction or sex.<sup>62</sup> In the report submitted to the International Labour Conference at its 40th Session it was stated: "Where freedom to engage in employment on one's own account or to practise in a professional capacity is conditional on possession of a licence or title granted at the discretion of the national authorities or of autonomous professional bodies, there may be complaints that complete objectivity is not observed as regards varying professional qualifications; this may be particularly so in the case of the recognition of professional qualifications acquired in foreign countries."<sup>63</sup>

### Placement

93. The existence of a public employment service may be an essential element of a policy for promoting equality of opportunity and treatment in employment.<sup>64</sup> Several countries have stated that the principle of equality laid down in the constitutional provisions or in legislation applied to placement services in the same way as to any other public service. In the USSR it is one of the functions of the placement offices to assist in placing in employment women who have children, women who look after their household and women who farm their own plot of land.<sup>65</sup> In Haiti provisions are in force forbidding officials or other persons in the service of the State to practise any discrimination whatsoever in the performance of their functions. In some countries special laws or regulations governing the operation of the placement services contain provisions that prohibit discrimination in placement: observance of the principle of equality of treatment in the operation of the service,<sup>66</sup> ban on the

<sup>62</sup> See as regards the EEC, the directives concerning the equivalence of diplomas in the Member States of the Community (doctors, nurses, dentists, veterinary surgeons, midwives, pharmacists, architects) and the proposed regulations for the legal professions, R. Waengenbaur, "Free movement in the professions: The new EEC proposal on professional qualifications", Common Market Law Review, Vol. 23, 1, 1986, pp. 91-109.

<sup>63</sup> ILO, Discrimination in the field of employment and occupation, ILC, 40th Session, 1957, Report VII(1), p. 7.

<sup>64</sup> The Employment Service Convention (No. 88) and the Recommendation (No. 83), 1948 on the same subject contain provisions concerning placement services operated by the responsible authority. Paragraph 12(c) of the Recommendation provides that the employment service "should not, in referring workers to employment, itself discriminate against applicants on grounds of race, colour, sex or belief".

<sup>65</sup> Standard regulations applicable to placement offices, annexed to Order No. 28 of 16 January 1987 of the State Committee of Labour and Social Affairs of the USSR, s. 3.4.

<sup>66</sup> Suriname, s. 3(2) of the Labour Exchange Act (religion, political and social beliefs, membership or non-membership in an organisation; no reference is made to the grounds of sex or race).



application of discriminatory criteria,<sup>67</sup> prohibition for the service to receive or fill offers of employment involving discriminatory conditions,<sup>68</sup> prohibition for an employer to refuse, on grounds deemed to be discriminatory, to hire a person who is proposed to him by the placement service.<sup>69</sup> In its report the Government of Czechoslovakia states that only in specified cases may an enterprise refuse to enter into a contract with a worker who is recommended to it by the National Committee, which is the state body responsible for labour questions and whose functions include the placement of persons applying for employment or for an apprenticeship contract.<sup>70</sup> In countries where there are private employment agencies, these should observe the government's policy in respect of equality of opportunity and treatment. There should be legislative provisions specifying the kind of information which may be recorded by these agencies and communicated by them to employers and indicating

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<sup>67</sup> Federal Republic of Germany, under Regulation No. 167/81 of 15 September 1981 applicable to the Federal Employment Agency, offers of employment or apprenticeship must be communicated to applicants without restriction as to sex. In practice, direct discrimination on grounds of sex occurs where an employer's offer of employment is specified as being open only to a man or to a woman. In such cases, the Regulation provides that the officer of the placement service must draw the employer's attention to s. 611 of the Civil Code, under which differential treatment according to sex is permitted only if being of the particular sex is an essential condition for the performance of the activity in question. If despite this warning the employer does not change the terms of his or her offer, the responsible officer shall enter the offer in the statistics. These difficulties have been removed to a large extent by changes in the forms for apprenticeship in 1984: henceforth the employer must specify the sex in the column entitled "Special requirements". In 1985, in the area served by the Federal Employment Agency in Hamburg, 60 per cent of the offers of apprenticeship were open to both sexes (in 1984 the proportion had been 15 per cent), 30 per cent to men only (63 per cent in 1984) and 10 per cent to women only (22 per cent in 1984); see also Benin, Denmark, Iraq, Mali, Sierra Leone, Yugoslavia.

<sup>68</sup> Mexico, Morocco.

<sup>69</sup> Israel; in addition, any breach of s. 42 (prohibiting discrimination) of the Employment Service Act constitutes an offence. RCE 1979, p. 185.

<sup>70</sup> Provision is made for three such cases: the worker is either not physically or mentally able to perform the activity in question; the worker lacks the professional know-how or does not fulfil the conditions required or imposed by the nature of the job; the recruitment of the worker would conflict with the general regulations concerning the establishment of an employment or apprenticeship relationship. See also USSR, Regulations concerning the employment sections of the executive committees of the soviets of people's deputies for the territories and regions, adopted by the Council of Ministers of the RSFSR on 1 October 1982, art. 51.

in what form the relevant particulars may be recorded and communicated.<sup>71</sup> The governments of some other countries have reported that employment services other than those operated by the State are subject to the supervision of the State's administrative authorities and that penalties, such as the withdrawal of the licence, may be imposed in the event of any breach of the obligation to observe the principles laid down by the State in this field.<sup>72</sup>

94. In an earlier survey the Committee had stated: "It is important that, in its practical day-to-day action and in its relations with its users, the employment service should not confine itself to respecting merely the negative aspect of the principle of non-discrimination - that is, to abstain from practising discrimination - but should also act in the positive sense of developing effective equality in employment matters."<sup>73</sup> Article 3(c) of the Convention provides that each Member for which the Convention is in force undertakes to ensure the observance of the national policy designed to promote equality of opportunity and treatment in respect of employment and occupation in the activities of placement services under the direction of a national authority.<sup>74</sup> Several countries have reported on measures taken to ensure that the activities of the placement services take into account the promotion of the equality policy. In Sweden the Labour Market Administration has for a long time included staff specialising in questions concerning equality. In Norway the National Equality of Opportunity Council has suggested that advisers on equality of opportunity should be recruited to work in all employment offices. The function of these advisers would be to provide information on a full-time basis about equality of opportunities and to provide continuing training for staff members of these services in this field. Where employment and occupational registers are used to facilitate the placement of

<sup>71</sup> Denmark, Notification concerning private employment agencies dated 11 August 1986, issued pursuant to the Act of 8 June 1978. It is forbidden to record any particulars of the race, religion, political activity, sexual practices, criminal record or drug use of a person who applies for employment. Under s. 2 of the Notification, personal particulars (colour, membership in associations, health, social activities, etc.) are not recorded unless they are necessary for recruitment evaluation and the applicant is told about them, or unless, with the written consent of the applicant, they are sought by the agency for the purpose of being recorded. The agency has a duty to inform the person concerned, within four weeks, of the contents of the particulars recorded. The person's consent may be withdrawn at any time.

<sup>72</sup> See e.g. Austria.

<sup>73</sup> General Survey 1963, para. 105.

<sup>74</sup> According to Articles 4 and 10 of the Fee-Charging Employment Agencies Convention (Revised) (No. 96), 1949 the expression "placement services under the direction of a national authority" includes - for the countries which have ratified the Convention - both placement agencies conducted with a view to profit and agencies not conducted with a view to profit.

applicants for jobs, some countries lay down the condition that these registers must not contain any particulars that might lead to indirect discrimination.<sup>75</sup> From the information available it appears that in many cases the practices followed by placement services ought to be reviewed in the light of the objectives of the equality policy in order to eliminate anything that tends to perpetuate direct or indirect discrimination on grounds of sex.<sup>76</sup>

### Access to wage-earning or salaried employment

95. The application of the principle of equality of opportunity and treatment for all persons in respect of access to employment of their own choice does not confer upon every person a right to obtain a particular post regardless of his or her qualifications or other conditions,<sup>77</sup> but means that every person has the right to have his or her application for appointment to the post of his or her choice considered equitably, without discrimination based on any of the grounds referred to in the Convention.<sup>78</sup> The recruitment procedure, and the statement of reasons in the event of an adverse decision on the application for appointment, are of great importance for the respect of this right. In several countries a person whose application for appointment to a post that had been publicly advertised has been refused may ask the employer for explanations in writing as to the training, practical experience and other easily identifiable qualifications of the person of the other sex who has

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<sup>75</sup> See e.g. in France the *Répertoire opérationnel de la main d'oeuvre* (ROME); United Kingdom.

<sup>76</sup> See above, the results achieved in the Federal Republic of Germany by a change of the relevant forms, footnote 67.

<sup>77</sup> In this sense it cannot be regarded as on a par with the priority accorded to a worker who may be entitled to reinstatement by an employer whose service he or she had left owing to circumstances beyond his or her control, or to a specific category of workers expressly mentioned in a legislative provision or regulation as enjoying a privileged position for recruitment purposes, generally by virtue of a quota (persons in receipt of a pension for war-time service, veterans, handicapped workers). Such obligation, laid down in legislation or regulations, to make room to a greater or lesser extent for the employment of a specified category of persons (women, members of disadvantaged groups, etc.) is used within the framework of Article 5, paragraph 2, of the Convention. See Chapter III, Section 3 below.

<sup>78</sup> The Court of Justice of the European Communities, in its judgement of 10 April 1984 in Case No. 79/83, Harz v. Deutsche Tradex GmbH did not accept the argument that the Directive concerning equal treatment created a right for a person to have a job. By implication, the Court expressed its preference for the employer's freedom of contract, subject however to the candidate's right to have his or her application for the post considered equitably.

been appointed to the post in question.<sup>79</sup> According to their reports, in some countries recruitment to a post must be based on objective criteria, competence or merit, excluding requirements not connected with the performance of the activity in question or with the conditions under which the activity is carried on.<sup>80</sup> This is aimed specifically at requirements as to height, weight or physical strength, which must not be regarded as objective criteria for recruitment purposes, except in so far as they are requirements inherent to the performance of a particular activity.<sup>81</sup> In some countries the labour legislation specifies the information which must be given to the employer and which will be recorded in the personnel file of the worker concerned.<sup>82</sup> In other countries the employer is forbidden by law to inquire into the political, religious or trade union views of the person concerned, or into any event unrelated to the evaluation of the occupational aptitude of workers for the purpose of their recruitment.<sup>83</sup> Under provisions in force in some of the States of the United States the employer may not ask for or attempt to obtain particulars of certain aspects of a candidate's personality or of his or her physical or mental condition.<sup>84</sup> As a general rule,

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<sup>79</sup> Finland, Act on Equality between Women and Men, No. 609/86 of 8 August 1986, s. 10; Norway, Equality between the Sexes Act, No. 45 of 18 June 1978, s. 4; Sweden, Act of 1979 respecting equality of women and men in employment, as amended, s. 5A.

<sup>80</sup> See e.g. Portugal, Legislative Decree No. 392/79, s. 7(2); see also Chapter III, Section 1 below.

<sup>81</sup> See above (Chapter I, Section 3, para. 44.)

<sup>82</sup> See e.g. Bulgaria, Decision No. 16 of 24 February 1987 concerning the documents to be produced for the purpose of the conclusion of a contract of employment (passport or identity document, curriculum vitae, evidence of specialised skill, extract from police record, permit of labour inspectorate if the worker is under the age of 18 years, medical certificate and personal health record).

<sup>83</sup> For example, Italy, Act No. 300 of 20 May 1970 respecting the protection of workers' freedom and dignity, LS 1970-It. 2, s. 8. See also France: the Government has stated (Minister's reply No. 13.309, Journal Officiel de l'Assemblée Nationale, 16 March 1987) that the sole object of the information requested of employees for purposes of recruitment must be to make it possible to evaluate the occupational qualifications of candidates; the particulars requested must be directly related to the post which the person concerned has applied for.

<sup>84</sup> See e.g. Michigan, Art. 2, s. 205a of the Civil Rights Act (prohibition on obtaining information orally or through a recruitment form, prohibition on setting up or keeping files dealing with religion, race, colour, national origin, height, weight, marital status); Pennsylvania, s. 955(b)(1) of the Human Relations Act (prohibition on obtaining, keeping and using information concerning colour, race, religious belief, family origin, sex, national origin, past physical or mental handicaps); Rhode Island, s. 28-5-7D of the Equitable Practices in Employment Act, etc.

the data contained in personnel files must be safeguarded in such a way that the worker's privacy is respected. To achieve this objective various measures are possible: prohibition against keeping personnel files beyond a certain time; prohibition of the disclosure of certain information;<sup>85</sup> submission of the personnel file to the worker in order that he or she may satisfy himself or herself that the data do not contain any matter unrelated to the needs of the job,<sup>86</sup> etc.

96. In a number of countries action has been taken to forbid the publication in the press of discriminatory offers of employment or the announcement of such offers by an employer. The Government of Yugoslavia has indicated that, for the purpose of ensuring compliance with the procedure for competitions and public offers of employment in its country, the Labour Inspectorate is responsible for taking action to eliminate from announcements of competitions and of job vacancies any reference to the requirement of "moral and political suitability", which has been ruled unconstitutional by a joint session of the presiding judges of the Constitutional Courts.<sup>87</sup> In other countries the law provides that it is an unlawful discriminatory act to use or distribute forms of application for employment, or for an employer or prospective employer to publish an advertisement or to carry out interviews or make written inquiries, that contain or imply restrictions, conditions or preferences based on unlawful grounds.<sup>88</sup> By virtue of such provisions all the persons concerned are liable to penalties: the person responsible for the enterprise in question, the person responsible for the newspaper or journal which

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<sup>85</sup> For example, United States, Connecticut, s. 46a-80 of the Human Rights Act (prohibition on disclosing information about detention not followed by conviction); Illinois, s. 2-103 of the Human Rights Act (information about detention).

<sup>86</sup> See below, para. 121.

<sup>87</sup> RCE 1986, p. 226; see also Chapter I, Section 3, para. 59.

<sup>88</sup> Australia, Victoria, ss. 18(1) and 27B of the Equal Opportunity Act 1977 as amended by the Equal Opportunity (Discrimination against Disabled Persons) Act 1982 (discrimination on the basis of sex, marital status, existing or past physical or mental impairment), LS 1977-Aust. 1 and LS 1982-Aust. 1; Canada, s. 8 of the Canadian Human Rights Act (unlawful grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability); United States, s. 704(b) of the Civil Rights Act 1964 (unlawful grounds of discrimination: race, colour, religion, sex, national origin); France, s. 416(3) of the Penal Code as amended by Act No. 83-635 of 13 July 1983 (origin, sex, moral conduct, family status, membership of a particular ethnic, national, racial or religious group; as regards sex, the ban on making an offer of employment conditional on the sex of the applicant covers the private sector as well as the entire public service; in addition to sentencing an offender to the penalty applicable, the court may direct that its judgement be posted and published).

published the advertisement in dispute,<sup>89</sup> the person responsible for the employment agency (if such an agency was involved), etc. Other provisions deal more specifically with particular grounds of discrimination<sup>90</sup> and are of more limited scope as regards the persons who are liable to prosecution. Apart from their practical aspect these measures may make it possible to revise the description of trades or occupations that carries a "male" or "female" implication, by requiring offers of employment to be drafted in the most neutral terms possible. In this way, these measures contribute to the prevention of indirect discrimination.

97. Indirect discrimination seriously affects equality of access to occupations because, first of all, it aggravates the consequences of segregation in training, in particular to the detriment of women. The occupational segregation noted in access to training that leads to "typically male" or "typically female" trades or occupations manifestly recurs in access to these occupations. It appears however that the mere availability of adequate training does not guarantee that the occupation for which the training is to prepare a person is actually open to that person. Archaic attitudes and stereotypes as regards the distribution of "male" and "female" tasks are still

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<sup>89</sup> Canada, British Columbia: in the case of Hope v. Gray Grant Publishers (1981, 2 C.H.R.R.D/256), the Inquiry Office directed the publisher to discontinue the publication of discriminatory advertisements but also to publish a notice in the classified advertisements section stating that under the Province's human rights legislation such discriminatory advertisements were prohibited.

<sup>90</sup> Federal Republic of Germany, s. 611(b) of the Civil Code as amended by the Act of 30 August 1980 (sex); Australia, s. 14 of the 1984 Act (sex, including marital status and pregnancy); Denmark, s. 6 of the Act No. 161 (sex, pregnancy, marital status, family status); Finland, s. 14 of Act No. 609 of 8 August 1986; Ireland, s. 8 of the Employment Equality Act 1977 (sex, marital status); Italy, s.1(2) of Act No. 903 of 1977 (sex, family status, marital status, pregnancy); Luxembourg, s. 3(1) of the Equality of Treatment Act 1981 (sex, marital status, family status); New Zealand, s. 1 of the Race Relations Act 1971 (race, colour, ethnic origin of the person concerned or of his or her relatives or of any associate of that person); Norway, s. 4 of Act No. 45 (sex, marital status, family status); Netherlands, s. 3(1) of the Equality of Treatment for Men and Women Act (sex, marital status, family status); Portugal, s. 7(1) of Legislative Decree No. 392/79 (sex, marital status, family status); under s. 8 of Legislative Decree No. 491/85 of 26 November 1985 penalties are prescribed in respect of certain discriminatory practices, such as the publication of notices of vacancies for posts intended only for persons of one sex or the other and the institution of systems making job descriptions or evaluations containing inequalities based on sex, see RCE 1987, p. 372; United Kingdom, s. 6(1) of the 1975 Act (sex, married persons).

prevalent, even though some progress may be noted.<sup>91</sup> One of the reasons for the sex-based segregation in occupations is the presupposition that women have to be restricted to a relatively small number of occupations because of the ideas and preferences of employers which are themselves bound up with the general attitudes in society as a whole towards the employment of women. A kind of reluctance on the part of employers to hire certain persons has been described as "statistical discrimination", an expression which refers to an adverse decision taken with respect to a person by reason of characteristics thought to be typical of the group to which he or she belongs. The widespread acceptance of the assumption that productivity differs between one sex and the other is the basis of the statistical discrimination practised by employers. In accordance with this model employers do not recruit anybody belonging to a group whose productivity - in the employers' opinion - is lower. Statistical discrimination contributes to occupational segregation in two ways. First, because they share the belief that men and women differ in their performance at work, employers may tend to favour the one or the other sex for a specific task: jobs calling for great manual nimbleness would be given to women, those calling for the exertion of physical strength to men. Secondly, if the employer expects women to be more likely than men to leave their job, e.g. to bring up their children, he or she will recruit women for jobs calling for little or no in-service training or calling for qualifications the cost of which is borne by the workers themselves. Evidence of this occupational segregation can be found in the sexist job descriptions in ordinary language and in the mass media. Despite the efforts that may be deployed to make some descriptions of occupations more neutral, a good many descriptions are still distinctly sex-related.<sup>92</sup>

98. The problems of sex-based occupational segregation have been studied by many governments, as is shown by the considerable body of research and surveys on the subject. In Romania there is a high concentration of women in commerce (60.2 per cent of all commercial workers in 1982), while in the industrial sector women are mainly employed in the textile, synthetic fibre and clothing industries;

<sup>91</sup> France: According to a survey carried out in 1982 by the Association pour la formation professionnelle and the Centre d'études de l'emploi, out of three women who had trained for a traditionally "male" occupation, only one works in that occupation, the second works in a different occupation, and the third is unemployed. The situation seems to be more favourable for employment as technical workers, where one in two women works in the occupation for which she trained. The basic difficulty in some occupations, e.g. electrical and metal trades, lies in access to employment, as staff turnover is rather low. The lukewarm welcome that awaits them explains why skilled female manual workers are still knocking on the factory door. ILO, Social and Labour Bulletin, 2/83, p. 283.

<sup>92</sup> For example, cleaning woman, repairman, hostess, watchman, etc.



very few women are employed in the high-technology industries.<sup>93</sup> In many other countries women are heavily concentrated in the tertiary sector.<sup>94</sup> De facto sex-based occupational segregation occurs not only as between one sector and another or as between different branches of an occupation, but also within enterprises. According to a survey carried out in the United States, in 231 of the 391 leading firms in one of the states there is complete de facto sex-based segregation; in none of these firms do men and women hold identical posts.<sup>95</sup> In the United Kingdom a survey has shown that sex-based segregation in employment was still very common: 63 per cent of women work only with women, 81 per cent of men work only with men.<sup>96</sup> Occupational segregation may also be the result of a recruitment policy adopted by enterprises of deliberately limiting the number of women recruited - a policy conflicting with the sex equality policy laid down by the authorities.<sup>97</sup> This kind of segregation, while not

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<sup>93</sup> ILO, Social and Labour Bulletin, 4/83, p. 606; see also Hungary: women predominate in the commercial and service sectors, whereas they are still in the minority in the building, transport, communications and water supply industries. The share accounted for by women in the working population increased between 1970 and 1980, but the distribution of the female labour force among the various economic sectors remained unchanged during that decade, see Y. Vertes, The status of women in Hungary, National Council of Hungarian Women, 1981; for an explanation ascribing this distribution of the labour force to the fact that certain activities were reserved for women with a view to facilitating their access to employment, the consequence being a rapid "feminisation" of these activities where only women applied for employment, see E. Gömöri, "Special protective legislation and equality of employment opportunity for women in Hungary", International Labour Review, Vol. 119, No. 1, Jan.-Feb. 1980; Yugoslavia: women account for 75.7 per cent of the labour force in the medical and social services, for 78.7 per cent in the banking sector and for 53.5 per cent in the educational and cultural professions, CEDAW/C/5/Add.18.

<sup>94</sup> See e.g. Austria: 45 per cent of women workers are employed in the service sector, see Verdienstdifferentiale zwischen Männern und Frauen, Josef Christl, November 1985; in Switzerland the proportion is 47 per cent, see "Congrès des femmes USS", Revue syndicale, Mar.-Apr. 1983, No. 3/4, p. 60.

<sup>95</sup> California: W.T. Bielby and J.N. Baron, "A woman's place is with other women: Sex segregation within organisations", in B.F. Reskin (ed.), Sex Segregation in the Workplace: Trends, Explanations, Remedies, Washington, DC, 1984.

<sup>96</sup> Department of Employment, Employment Gazette, May 1984, pp. 199-209.

<sup>97</sup> See e.g. Bolivia: pursuant to s. 3 of the General Labour Act the female workforce may not account for more than 45 per cent of the staff of the enterprises or establishments, which by their nature, do not need a larger female workforce; China: The Seventh Women's Congress of Beijing Municipality stated that some factories and

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always coinciding with the fact that, compared with their overall share in the staff, women tend to be overrepresented in the lower ranks of the enterprise, is correlated with this inequality. One point noted in the studies concerning this phenomenon of de facto sex-based occupational segregation is that women are particularly highly represented in the branches or sectors of activity and in the trades and occupations where personal incomes are traditionally the lowest. Various measures have been adopted to fight against this phenomenon. The practice of setting quotas is used in several countries. In some cases quotas have been introduced to counteract the trend towards the "feminisation" of certain occupations, whereas no such action was taken or planned in the more numerous cases where men are predominant in a trade or occupation.<sup>98</sup> In a number of countries which have ratified the Convention a subsidy to promote equality of status is payable to any employer who recruits a woman for a job traditionally regarded as a "male" occupation, and in one country such a subsidy is payable also to an employer who recruits a man for a "female" occupation.<sup>99</sup> According to some surveys, the reason why occupational segregation has become less pronounced is that men were entering traditionally "female" occupations, rather than that women were entering traditionally "male" occupations.<sup>100</sup>

99. Equality of access to freely chosen employment within the meaning of the Employment Policy Convention, 1964 (No. 122) will be seriously jeopardised in cases where forced or compulsory labour is

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undertakings did not want to hire women workers and had fixed a quota limiting recruitment of women to 30 per cent of the workforce. The same thing, it was said, happened in training institutions, some of which reportedly enrolled more male than female students, thus contravening the regulations of the Ministry of Education, ILO, Social and Labour Bulletin; 2/83, p. 281.

<sup>98</sup> Poland: On 3 March 1987 the Constitutional Court set aside a decision of the Ministry of Health and Social Welfare which had fixed a 50 per cent quota for the admission of women to medical schools, the object being to reduce the over-representation of women in the medical professions; the reason given by the Constitutional Court for its ruling was that the quota was incompatible with the principle of the equality of citizens laid down in the Constitution and inconsistent with the Higher Education Act of 4 May 1982. The Ministry was obliged to rescind the decision concerning the quota; see also below, para. 101, France, for analogous provisions concerning the public sector.

<sup>99</sup> Spain, s. 14 of the Order of 21 February 1986 makes provision for a programme of wage subsidies for the recruitment of women in occupations in which they are under-represented; in Norway and Sweden subsidies have been payable since 1974 to employers who recruit persons of one sex to posts traditionally held by persons of the other sex.

<sup>100</sup> As regards the United States, see B.F. Reskin and H.I. Hartmann (eds.) Women's Work, Men's Work - Sex Segregation on the Job, Washington, DC, 1986.

imposed on certain categories of persons defined according to criteria within the scope of the instruments of 1958.<sup>101</sup> The Abolition of Forced Labour Convention, 1957 (No. 105) prohibits in its Article 1(a) the use of any form of forced or compulsory labour "as a means of political coercion ... or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system" and, in Article 1(e), "as a means of racial, social, national or religious discrimination".<sup>102</sup> From the information available it appears that some categories of persons or social groups may suffer discrimination in recruitment. Aboriginal and tribal populations are not, of course, the only groups in a national society to be vulnerable directly to discrimination by means of coercion or improper practices in recruitment and employment. The fact is nevertheless that in many parts of the developing world these populations have been and in some cases are still nowadays particularly liable to be victims of discrimination of this kind. In a number of countries these population groups consist of seasonal workers, including plantation workers, which, unlike other workers, are not protected by national labour legislation. In other cases, instances of debt bondage and other forms of servitude are particularly common among workers in this category. The United Nations study of the problem of discrimination against indigenous populations stresses the importance of this question.<sup>103</sup> In this study the Special Rapporteur notes that in some countries, in sectors of the economy in which working conditions and pay are wretched - below the national average - the workforce tends to be composed almost exclusively of indigenous workers. Although in theory their conditions of employment ought to be governed by the labour legislation, in practice the provisions of both national and international law are very commonly breached in the case of these workers. Such exploitative regimes as serfdom, debt bondage and the many types of compulsory service have been abolished by law. Yet there is conclusive evidence that practices of this kind still continue and that the victims are frequently indigenous populations.<sup>104</sup> In only a few countries are measures in force for

<sup>101</sup> Under Article 1, paragraphs 1 and 2(c) of the Employment Policy Convention, 1964 (No. 122), an "active policy designed to promote full, productive and freely chosen employment ... shall aim at ensuring that ... there is ... the fullest possible opportunity for each worker to ... use his skills and endowments in a job ... irrespective of race, colour, sex, religion, political opinion, national extraction or social origin".

<sup>102</sup> See ILO, General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the Abolition of Forced Labour, ILC, 65th Session, 1979, Report III (Part 4B), paras. 133 to 141.

<sup>103</sup> E/CN.4/Sub.2/476/Add.4.

<sup>104</sup> *ibid.*, para. 57(a): "... it was recognised that a special problem exists in countries with indigenous populations who might be vulnerable to exploitation, such as debt bondage and other slavery-like practices ...".

the special protection of indigenous workers.<sup>105</sup> In Brazil all Indians are deemed to qualify for the benefit of special regulations as wards of the National Foundation for the Indians (FUNAI).<sup>106</sup> These regulations provide in general terms that the Indians are entitled to the benefit of the Brazilian labour legislation and specify that any contract of employment entered into with "isolated Indians" is void, and that contracts must be approved by the Foundation, which will issue guide-lines concerning the conditions of employment of Indians. In other countries in Latin America measures have been adopted in recent years for improving the conditions governing the recruitment and employment of indigenous rural workers, either by the enactment of regulations applicable to recruitment activities that are not subject to licence or by extending the scope of application of the national labour and social security legislation to cover rural seasonal workers. In Guatemala the Government has made regulations for the application of the Plantations Convention; the regulations contain provisions concerning the recruitment and employment of the workers, the transport of workers, and their living and working conditions.<sup>107</sup> In Bolivia a decree has been enacted concerning the applicability of the general labour legislation to seasonal workers.<sup>108</sup> Pursuant to the Decree, private recruitment is forbidden, workers may only be recruited in their home area or at the worksite, transport must be provided for them free of charge and they must be paid at the rates in force locally. In India special problems arise because of the existence of the system of debt bondage

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<sup>105</sup> Some ILO Conventions contain specific provisions for the protection of certain categories of workers: the Recruiting of Indigenous Workers Convention, 1936 (No. 50), which requires that the recruiting of such workers should be regulated and prescribes rules for avoiding recourse to pressure in the recruitment; the Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64), and the Contracts of Employment (Indigenous Workers) Convention, 1947 (No. 86), which specify the conditions of form and of substance to be observed in the conclusion of contracts between an employer and an indigenous worker. In 1985 the Governing Body decided, subject to certain appropriate guarantees, that reports should no longer be requested on these Conventions because they appeared to have lost their relevance. If, however, the situation should change in such a way that the one or more of these Conventions again became relevant, the Governing Body would be free to call for the resumption of detailed reports on their application. ILO, Official Bulletin, Vol. LXVIII, 1985, Series A, No. 3, p. 110. The Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Plantations Convention, 1958 (No. 110) also contain provisions concerning the recruitment and employment of certain categories of workers.

<sup>106</sup> Act No. 6001 of 19 December 1973 to make regulations applicable to Indians.

<sup>107</sup> Decree No. 103-84 of 27 February 1984.

<sup>108</sup> Presidential Decree No. 20255 of 24 May 1984.

which continues to produce its harmful effects in many regions even though it has been abolished by law.<sup>109</sup>

### Access to the public service

100. In so far as the State as an employer must abide by the principles whose observance it is to promote, and by reason of the size of the employment under the State's control, the public sector plays a key part in the general implementation of the government's policy for promoting equality of opportunity and treatment in employment. In addition, in some countries a preparatory period in the public service is mandatory for persons wishing to enter, for example, the teaching or legal profession, even if they have no intention of remaining in the public service subsequently.<sup>110</sup> So far as employment in the public service is concerned, the principle of equality of access for citizens is laid down in a large number of constitutional provisions<sup>111</sup> and regulations governing the public service.<sup>112</sup> The provisions affirming the principle of equality of access may be supplemented by provisions guaranteeing access to

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<sup>109</sup> By virtue of s. 4(1) of the Bonded Labour System (Abolition) Act, 1976, that system was effectively abolished and any person required to perform services under that system was released from any obligation to perform such services. The Act was amended in 1985 in order to speed up the identification and release of agricultural workers still subject to such a system; see also RCE 1980, pp. 64 and 65, RCE 1984, pp. 78-81, and RCE 1986, pp. 85 and 86.

<sup>110</sup> See Federal Republic of Germany: In its decision of 22 May 1975, the Federal Constitutional Court stated: "It is open to the State to require the successful completion of a period of preparatory service as a prerequisite both for state service as an official and for an independent profession, and generally to organise it in such a way that the service may be performed in an employment relationship under civil law or in a special relationship under public law other than the relationship of an official. If it opts for a preparatory service which must be performed under a relationship of official, then for those who contemplate a profession outside state service it must either offer an equivalent, non-discriminatory preparatory service which can be performed without appointment as an official or include in its civil service regulations provision for an exception allowing the preparatory service to be performed, if desired, outside a relationship of official." Report of the Commission of Inquiry appointed to examine the observance of Convention No. 111 by the Federal Republic of Germany, ILO, Official Bulletin, Vol. LXX, 1987, Series B, Supplement I, para. 207; see also para. 517.

<sup>111</sup> Bangladesh, s. 29 of the Martial Law of 1972, as amended in 1986; Guatemala, art. 113 of the Constitution.

<sup>112</sup> Peru, s. 4 of Legislative Decree No. 276 of 6 March 1984 to enact the basic law governing careers and remuneration in the public service.

employment in the public service without discrimination based on various grounds.<sup>113</sup>

101. From the information available it appears that the commonest - and often the only - prohibited ground of discrimination mentioned in the regulations applicable to the public service is that of sex.<sup>114</sup> What is specially noteworthy in this connection is the trend towards the removal of restrictions - as regards access to certain agencies - that were formerly applicable to women in many countries.<sup>115</sup> Some enactments which provide for equal opportunities and treatment for men and women are applicable to the public sector only,<sup>116</sup> others apply to both the public and private sector,<sup>117</sup> while yet others contain some provisions applicable to the public service. In an earlier general survey the Committee considered the application of the principle of equal remuneration in the public sector; the conclusions reached by the Committee in that survey are equally valid as regards the present survey.<sup>118</sup> In the light of the information available, however, a number of points call for further discussion. In the first place,

<sup>113</sup> Australia, s. 33(3) of the Public Service Act, 1922, as amended by the Public Service Reform Act, 1984, RCE 1987, p. 355 (political affiliation, race, colour, ethnic origin, social origin, religion, sex, sexual preference, marital status, pregnancy, age, physical or mental disability); Finland, s. 17 of the 1986 Act concerning officials (sex, age, political activity, trade union activity); France, s. 6 of Act No. 83-634 of 13 July 1983 concerning the rights and obligations of officials (political opinion, trade union views, philosophical or religious opinions, sex, membership of an ethnic group).

<sup>114</sup> Tunisia, s. 11 of the Act of 12 December 1983 to issue public service regulations; Switzerland: Laws concerning cantonal officials of the cantons of Jura and Geneva.

<sup>115</sup> See e.g. Algeria, Decree No. 83-481 of 13 August 1983 authorising the recruitment of persons of either sex to serve in national police, RCE 1985, p. 277; Belgium, Royal Order of 3 February 1981 opening to women all ranks and functions in the Belgian armed forces, RCE 1983, p. 205; Côte d'Ivoire, Interministerial Order No. 89 MJ.DSJ/FP of 6 July 1987 admitting females to participate in competitive examinations for the recruitment of supervisors and chief supervisors of prisons; Portugal, Legislative Decree No. 251/74 of 12 June 1974 admitting women to careers in local administrations, Legislative Decree No. 308/74 of 6 July 1974 admitting women to careers in the diplomatic service, and Legislative Decree No. 492/74 of 27 September 1974 admitting women to service in the judiciary.

<sup>116</sup> Netherlands, Act of 2 July 1980 concerning equality of treatment in the public service.

<sup>117</sup> Iceland, s. 12 of Act No. 65 of 1985 concerning equality of status and rights of women and men; Italy, the 1977 Act cited above.

<sup>118</sup> ILO, General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the Application of the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951, ILC, 72nd Session, 1986, Report III (Part 4B), paras. 199-215.

rules fixing quotas for the purpose of limiting the number of women in the public service<sup>119</sup> or providing for the separate recruitment of men and women are tending to be phased out,<sup>120</sup> and in cases where the system of separate recruitment is still currently in use the criteria for its application have been spelt out and now specify the qualifications needed for the performance of the function in question. However, a great deal remains to be done in this field. In several countries the public service regulations specify that the provisions governing access to employment in certain bodies may - on account of the exigencies peculiar to certain functions or of the circumstances in which these functions are performed, or owing to the nature of these functions - reserve access thereto for candidates of a particular sex.<sup>121</sup> In Côte d'Ivoire the regulations applicable to the personnel of the postal and telecommunications services give priority to females for access to certain functions, while at the same time debarring females from appointment to certain other functions.<sup>122</sup>

<sup>119</sup> Madagascar: s. 5(2) of Decree No. 61-225 of 19 May 1961, enacting rules for labour inspectors, which had limited female inspectors to 10 per cent of the total number of inspectors on account of the special conditions of physical aptitude required for certain jobs, was repealed by Decree No. 78-225 of 24 July 1978, RCE 1979, p. 186. Section 6 of Act No. 79-014 of 16 July 1979 respecting the public service regulations repealed s. 8 of the earlier regulations under which the employment of female staff in posts of responsibility could be limited to 10 per cent, RCE 1980, p. 172. It would be preferable, where a quota system is in force, to eliminate "ceiling quotas" and to replace them by quotas that unambiguously fix a "floor".

<sup>120</sup> Finland, Act of 1975 to repeal Act No. 112/26 concerning the admissibility of women to the public service; under the repealed Act it was formerly possible to make provision by Decree for the appointment of persons of a particular sex to certain functions.

<sup>121</sup> Benin, s. 12 of Ordinance No. 79-31 of 4 June 1979 to issue public service regulations; Central African Republic, s. 6 of Ordinance No. 80/064 of 1980 providing fundamental guarantees for officials (nature of the functions); Morocco, s. 1 of Dahir No. 1-58-008 of 24 February 1958 to issue public service regulations (provisions to take account of special status); Chad, s. 9 of Act No. 21-PR of 10 July 1967 to issue public service regulations; Tunisia, s. 11 of Act No. 83-112 to issue public service regulations (concerns the nature of the functions).

<sup>122</sup> S. 7 of Decree No. 68-24 of 9 January 1968 governing the personnel of the postal and telecommunication services; the Government has stated that these provisions, which are intended to protect women, were prepared in consultation with the Postal and Telecommunication Workers' Trade Union and that, at the time, the exclusion of women was justified by the nature of the services performed by the employees in question. The Government has stated that it plans to repeal any discriminatory provisions, in the light of technological developments and of the variety of the tasks carried out by postal and telecommunication workers, as a consequence of which conditions have become favourable for the admission of female workers.

What matters is that these preferential and exclusionary provisions should not have the effect of restricting the female employees to positions in which they have no real prospect of promotion. That would be the case if the women were disqualified from access to supervisory, co-ordinating or managerial functions or to certain technical functions that are higher in rank than those for which they enjoy a preference. In France a regulation was at one time in force which provided, in respect of a particular group of officials - teachers - for separate competitive examinations for recruitment for men and women in cases where the number of officials of either sex exceeded 65 per cent of the total number of these officials.<sup>123</sup> The Government withdrew the teaching profession from the list of professions for which recruitment in a manner at variance with the principle of the equality of the sexes might be permissible. The criterion concerning the exigencies peculiar to certain functions has proved too vague in practice and has been replaced, in several countries which formerly applied it, by the more functional criterion of the decisive condition for the discharge of the duties incumbent upon the public servants in question.<sup>124</sup> Secondly, provisions have been adopted in several countries to enhance

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<sup>123</sup> Decree No. 78-872 of 22 August 1978 concerning the recruitment of teachers. In an initial ruling (24 November 1982, Confédération française démocratique du travail) the Council of State expressed the view that the conditions for the performance of the functions in question could no longer justify an exception to the principle of non-discrimination, even though the exception might be based on "the nature of the educational function". The Council stated that "by reason of the tasks entrusted to pre-school and elementary school teachers in the public service and of the possible psychological value for children at that age of contact with both male and female teachers", the Government could lawfully take the view that, in the event of an excessive imbalance between the two sexes, "it might be justifiable, as an exception, to organise separate examinations for men and women, by reason of the nature of the educational function". In a second ruling (16 April 1986, Confédération française démocratique du travail), the Council of State indicated that "it was the intention of the legislature to permit separate recruitment in the exceptional cases where the excessive predominance of members of the one or the other sex would tend to be prejudicial to the operation of the public service and where, consequently, being of the one or the other sex should be regarded as a decisive condition for the performance of the services provided by the members of the teaching staff". In its reasoning the Council relied on the concept of the efficient operation of the public service as the basis for the decisive prerequisite for the performance of the functions in question. The Commission of the European Communities, for its part, had taken the view that the provisions of the Decree of 22 August 1978 were inconsistent with Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women.

<sup>124</sup> See e.g. France, s. 21 of Act No. 84-16 of 11 January 1984 to make regulations governing the public service of the State.



the opportunities of women to be recruited to the public service; for example, the upper age limit for entry into the public service has been raised for women who are bringing up or have brought up children,<sup>125</sup> or targets have been fixed to ensure equality of numbers of male and female employees in the public and administrative services.<sup>126</sup>

102. In many countries the rule commonly in force is that the right to enter and to make a career in the public service is based - as regards all or some of the posts - on merit, qualifications or aptitude, which are tested by means of a procedure of competitive examinations. In the context of the present survey it is not possible to discuss the examination procedures in detail, which vary greatly from country to country. The Committee notes that, essentially, these procedures correspond to the government's concern to obtain the services of the best qualified officials and ultimately to establish the grading system which is indispensable in any public administration.<sup>127</sup> It would be desirable, therefore, that - where this has not already been done - the provisions concerning in particular competitive examinations and physical tests which may be prescribed in certain cases should be reviewed from the point of view of equality of opportunity and treatment without discrimination based on one or more of the grounds mentioned in the Convention.<sup>128</sup> In

<sup>125</sup> See e.g. Federal Republic of Germany: The Government has stated that the upper age limit for entry into the public service has been raised to the age of 38 years for women who have brought up children; France, the Act of 9 July 1976 raised the age limit for entry into class A functions (or functions of the same rank in local authorities or public establishments) to the age of 45 years in the case of women who have brought up at least one child.

<sup>126</sup> Iceland, s. 12 of Act No. 65 of 1985.

<sup>127</sup> See General Survey of 1986 on equal remuneration, para. 204.

<sup>128</sup> See e.g. Belgium: The Bureau of the Commission du travail des femmes, in its opinion No. 44 concerning physical criteria for recruitment or promotion, invited every public service to check whether the use of physical criteria (physical characteristics and physical tests) was justified and to report the results of the inquiry to the Bureau; Italy: pursuant to the provisions of Act No. 874 of 13 December 1986 concerning limits of physical size for admission to competitive examinations, a person's size cannot be regarded as a non-discriminatory criterion. The Ministry of Labour has adopted a Decree (No. 295 of 16 December 1985) abolishing ergometric tests (based on muscular strength) for candidates for employment in the State Railways; France: s. 21 of Act No. 84-16 of 11 January 1984 to make regulations governing the public service of the State provides that "where physical tests are prescribed for the purpose of access to a particular branch of the public service, different tests or gradings varying according to the sex of the candidate may be provided for, subject to prior consultation with the technical joint committees". In such instances, the desire for equality should not lead to a uniformity of tests or gradings that might introduce an element of indirect discrimination.

addition, in some cases admission to the examination is subject to a decision by the administrative authority, which draws up a list of the persons allowed to take part in the competitive examination; in certain countries the courts are empowered to determine whether the principle of equality of treatment has been respected.<sup>129</sup> The reasoning given for the decision is of considerable importance in this field for the purpose of enabling the court to make an effective ruling on the authority's decision.<sup>130</sup> A difficulty may arise in

<sup>129</sup> See e.g. France: By virtue of s. 16 of the Decree of 4 May 1972 the Minister of Justice is responsible for drawing up the list of candidates authorised to take part in the competitive examination for admission to the Ecole Nationale de la magistrature. The exercise of the Minister's power is subject to supervision by the administrative court. Cf. Council of State, 18 March 1983, Mulsant: "Inasmuch as it appears from the documents in the case that, in taking the view that, because several years before the applicant had become a candidate he had taken part in noisy but non-violent student demonstrations, the applicant was not fit to carry out judicial functions with the necessary reserve and seriousness expected of members of the judiciary, the ... Minister of Justice based his decision on events which were not of a kind to justify that decision". Cf. also Council of State, 10 June 1983, Raoult: in this case, where the applicant had, one year before sitting for the competitive examination, played a part in writing articles for and distributing, inside a military base, a news sheet of a soldier's committee, the Minister of Justice had taken the view, in the light of certain passages in that news sheet, that this public expression of opinion was incompatible with the reserve and seriousness expected of a candidate for appointment to judicial functions; the Council of State held that "the decision challenged is based not on the political sympathies (of the applicant) but on specific acts on his part; ... the argument that other Ministers did not regard the acts in question as so serious as to justify the applicant's exclusion from the examination is irrelevant". This case law confirms the earlier case law (Council of State, 28 May 1954, Barel): in the case concerning a candidate who had been excluded from the competitive examination for admission to the Ecole Nationale d'administration because of his connection with the Communist party, the Council of State ruled that the authority responsible for drawing up the list of candidates "cannot, short of flouting the principle of the equality of all French citizens with respect to access to public employment and the public service, exclude from that list a candidate by reason solely of that candidate's political opinions".

<sup>130</sup> France: The Council of State has pointed out that, in cases where the candidate claims that he or she was excluded from a competitive examination on account of his or her political opinions, it is the duty of the administration, at the court's request, to produce the documentary evidence on which the decision was taken. Failing the production of this evidence, or if the evidence does not constitute a legitimate ground for excluding the candidate, his or her claims should be deemed to be proved. (Council of State, 26 October (footnote continued on next page)

countries where the substantive and procedural rules safeguarding officials against discrimination are not applicable to candidates for employment in the public service, whereas certain obligations which are binding on officials are also imposed on candidates. The observance of the principle of equality of opportunity and treatment as regards access to the public service is not guaranteed in cases where access to the service depends on presumptions concerning the candidate's future attitude that are based not on acts for which he is personally answerable but on opinions. In several countries independent bodies are responsible for applying the rules governing access to the public service, and these bodies have broad powers with regard to competitive examinations and appointments to the public service.<sup>131</sup> Most often, the decisions of these bodies need not be supported by a statement of reasons, and in many cases no appeal lies against their decisions. Where their decisions may be challenged by an appeal, these decisions may not be overruled or set aside except on a ground of discrimination expressly mentioned in a law, such as the law concerning discrimination based on sex or race. Hence, for the purpose of ensuring the application of the principle of equality of opportunity and treatment as regards access to employment in the public sector, it is essential that all the grounds of discrimination referred to in Article 1, paragraph 1(a), of the Convention should be mentioned in any legislation dealing with appeals of this kind.<sup>132</sup>

103. Some provisions specify that certain categories of posts in the public sector or in the public service are not subject to the rules governing recruitment based on a procedure for checking merit or qualifications, but to an appointments procedure. In some cases the appointments (or nomination) procedure is stated to be applicable to confidential, managerial or responsible posts, which are not however precisely defined.<sup>133</sup> Some of the relevant provisions do not give

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1960, Rioux and 21 December 1960, Vicat-Blanc); Italy, an adverse decision by the administration on admissibility to an examination must be supported by a statement of the reasons for the decision.

<sup>131</sup> Australia, Public Service Act; Canada, Employment in the Public Service Act; United States, Public Service Reform Act 1978; Ghana, s. 37 of the PNDCL Act No. 42 of 1982 (Public Service Commission); Japan; Kenya; Nigeria; New Zealand; Pakistan; Philippines, s. 2 of Presidential Decree No. 807; United Kingdom; Tanzania; Thailand.

<sup>132</sup> Australia, s. 33(3) of the Act cited above; Canada.

<sup>133</sup> Angola, s. 14 of the General Labour Act, Act No. 2/83 of 25 March 1983 to make disciplinary regulations concerning appointees, and Decree No. 94/83 of 7 June 1983 specifying posts to be filled by appointment; the Government has explained that the appointments procedure, for the purpose of which the views of the trade union committee at the workplace and of the party cell and other endorsements have to be obtained, is a precautionary measure; Colombia, s. 3 of Decree No. 2400 of 1968 and s. 18 of Decree No. 1950 of 1973 (offices of "free appointment and dismissal"). On this point see RCE 1986, pp. 267-268.

any indication for determining what is the nature of the posts in question.<sup>134</sup> The Committee has asked the governments to furnish particulars of the nature and number of posts subject to appointments or nomination procedures, and of the criteria used in the selection made, in order that it may examine the way in which the Convention is being observed in this field.

104. In several countries the provisions governing access to the public service have been amended so as to drop the requirement of "good conduct" or "good moral standing" which was formerly stipulated; the requirement has been replaced by provisions calling for particulars that are less open to various interpretation (e.g., police record).<sup>135</sup> Some such requirements are still in force in a number of countries.<sup>136</sup> Although in most cases these requirements are unrelated to the application of the Convention, their scope must, however, be examined, in order to ascertain the observance of the principle of the Convention in this field.

105. The security measures adopted with respect to candidates for employment in the public service may also affect the observance of the

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<sup>134</sup> See, e.g., Poland, s. 76 of the Labour Code (nomination in the light of the special nature of the work), LS 1974-Pol. 1A; Sao Tome and Principe, s. 28 of Decree No. 36/80 to prescribe rules for the evaluation of workers for the purpose of competitive examinations for recruitment and promotion (appointments by service commissions are not covered by the Decree). A provision to the same effect is contained in s. 6(1) of Decree No. 61/79 governing the National Employment Centre.

<sup>135</sup> See, e.g., France, s. 5 of Act No. 83-634 of 13 July 1983 to specify the rights and obligations of officials; Italy, single section of Act No. 732 of 29 October 1984 to repeal subsection 3 of s. 2 of the Decree of 10 January 1957.

<sup>136</sup> Luxembourg, s. 2(c) of the public service regulations, as amended on 4 August 1987; Rwanda, s. 5 of Legislative Decree of 19 March 1974 to enact general regulations governing state employees and s. 6 of the Presidential Order No. 227/01 of 20 December 1976 to enact regulations governing the personnel of public establishments. Among the conditions to be fulfilled for the recruitment of such personnel these regulations stipulate that candidates must be of "good conduct, respectable and of good moral standing" and must be "loyal to the national institutions and authorities". In Switzerland the Act governing access to the federal public service formerly stipulated that candidates must be of good repute. By s. 2, subsection 1, of the Federal Act to make regulations governing officials, as amended on 19 December 1986, this requirement was replaced by that of "good moral standing". The Office fédéral du personnel has stated that, so far as political activities are concerned, "in practice ... only a conviction on a criminal charge of extremist activities may be held to impugn the person's reputation and constitute a reason for non-selection"; Tunisia, s. 17, subsection 2, of Act No. 83-112 of 12 December 1983 to enact public service regulations; Zaire, s. 8(3) of the Regulations of 1 August 1981 governing the public service of the State.

principle laid down in the Convention. Such administrative security checks, generally limited to employment in confidential positions or in posts that are sensitive from the point of view of state security, are not commented on specifically in the reports supplied by governments. Nevertheless, from the information available it appears that in some countries such security checks are applicable without distinction to all posts in the administration.<sup>137</sup> Such inquiries should not be permitted or carried out except where justified by the inherent occupational requirements of the post in question. Moreover, any person who is denied access to a particular post for security reasons ought to have the right to appeal against the decision. It is of the utmost importance that an appellate remedy should be available to persons who are wrongfully denied access to a post for security reasons that are based on unlawful grounds of discrimination, such as national extraction, social origin, religion or political opinion.<sup>138</sup>

<sup>137</sup> See e.g. Nepal: Police reports are prepared on the activities of candidates for recruitment to permanent posts in the public service to check, inter alia, that the candidates have not engaged in political activities, the object being to preserve the administration's neutrality. A candidate who is not recruited on account of what is stated in the police report has no remedy and no right of appeal; Sweden: the 1969 Regulations concerning personnel checks are the legal basis for such inquiries; their object is to safeguard sensitive information that has to be kept secret because of considerations of state security. The Regulations specify the authorities empowered to carry out such checks and the procedure to be observed, but they do not itemise the posts deemed to be "sensitive", because in the Government's view a list of such posts would in itself constitute "sensitive information". For many countries, the provisions governing security checks are not available. See, for example, by contrast, Algeria, where s. 38 of Decree No. 85-59 of 23 March 1985 to issuing model regulations governing employees of public institutions and administrations provides that the institution or administration in question is under a duty to carry out an administrative inquiry before accepting a candidate's application for employment in certain posts or services which are itemised in special regulations.

<sup>138</sup> Australia: The 1979 Act to organise Australia's security services makes provision for the establishment of a tribunal to hear appeals involving security questions and to examine adverse evaluations or evaluations containing reservations for security reasons; Canada: the Commission which inquired into certain activities of the Royal Canadian Mounted Police (McDonald Commission) made a number of recommendations: the security procedure should be publicised; the procedure should be controlled and monitored; adverse security reports should be subject to internal review; a security appeals tribunal should be established. A Bill (C-157) for the establishment of the Canadian Security and Intelligence Service was submitted to Parliament in 1983. Canadian Human Rights Commission, Annual Report 1981, p. 16.

### Access to employers' and workers' organisations

106. Paragraph 2(f) of Recommendation No. 111 provides that "employers' and workers' organisations should not practise or countenance discrimination in respect of admission, retention of membership or participation in their affairs". This provision concerns the practice of employers' and workers' organisations; their practice may be influenced by provisions of national legislation or determined by the terms of their own regulations.<sup>139</sup> So far as national legislation is concerned, Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) lays down the principle that "Workers and employers, without distinction whatsoever, shall have the right to establish ... organisations".<sup>140</sup> In an earlier General Survey the Committee stated that difficulties as regards joining or retaining membership of an organisation to which Convention No. 87 applies might stem from restrictions relating, for example, to race, nationality, sex and political affiliation or activities.<sup>141</sup> So far as the organisations' own regulations are concerned, those of most of the trade union organisations contain provisions concerning membership and participation in trade union activities which prohibit discrimination on most of the grounds mentioned in the Convention, in particular discrimination on the grounds of sex, race and colour.<sup>142</sup> The rising share of women in wage-earning and salaried employment has

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<sup>139</sup> See e.g. United States, s. 703(c) of the Civil Rights Act 1964; Ireland, s. 5 of the Employment Equality Act 1977; United Kingdom, s. 12 of the 1975 Act and s. 12 of the 1976 Act.

<sup>140</sup> See ILO: General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the Freedom of Association and Collective Bargaining Convention (No. 87), 1948, ILC, 69th Session, 1983, Report III (4B), para. 76: "Convention No. 87 embodied a concept that had been highlighted in the preparatory work on the instrument, namely that freedom of association should be guaranteed without distinction or discrimination of any kind as to occupation, sex, colour, race, creed, nationality or political opinion. The only exception to this general principle is that stipulated in Article 9, which permits States to determine the extent to which the guarantees provided for in the Convention apply to the armed forces and the police."

<sup>141</sup> *op. cit.*, paras. 93-102.

<sup>142</sup> See e.g. Confederation of National Trade Unions (Canada), s. 5 of the Regulations of 1984; Confédération générale du travail (France), s. 1 of the Regulations of 1978; Canadian Labour Congress, s. 2 of the Regulations of 1984; Central Trade Union Council of Hungary, preamble to the Regulations; Workers' Organisation of Mozambique, s. 1 of the Regulations of 1984; Workers' Union of Burundi, s. 6 of the Regulations of 24 October 1986; General Union of Algerian Workers, s. 2 of the Regulations; National Workers' Union of Mali, preamble to the Regulations of 1982.

resulted in an increase of women members in trade unions. Their share in the membership has, however, kept lagging behind their corresponding share in employment, and a great deal remains to be done in this field.<sup>143</sup> It is for the employers' and workers' organisations to take action, in conformity with the ILO instruments concerning freedom of association and collective bargaining, in order to eliminate practices that may lead to direct or indirect discrimination based on any of the grounds mentioned in the Convention in respect of admission to or membership in such organisations and participation in their activities.

### Section 3. Terms and conditions of employment

107. In Article 1, paragraph 3, of the Convention the terms "employment" and "occupation" are defined as including "terms and conditions of employment". The meaning of "terms and conditions of employment" is further spelt out in the Recommendation (Paragraph 2(b)) which specifies the following areas: advancement in accordance with the individual character, experience, ability and diligence of the person concerned; security of tenure, which includes primarily protection against dismissal on unlawful grounds; remuneration for work of equal value; and conditions of work, "including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment". The concept of terms and conditions of work is broader than that of the general conditions of employment, which it comprises. A number of specific provisions concerning the most important constituents of this concept of "conditions of work", in particular remuneration, appear in most of the legislative enactments dealing with equality of opportunity and of treatment.<sup>144</sup> So far as

<sup>143</sup> See ILO: World Labour Report, Geneva, 1985, Vol. 2, p. 14. The percentage of female workers in total trade union membership in selected OECD countries varies greatly: 27 per cent (Canada, United States), 29 per cent (Japan), 34 per cent (United Kingdom), 43 per cent (Denmark), 47 per cent (Australia). The percentage accounted for by female workers in total trade union membership is generally lower in the Third World, though it has been rising in recent years. See also below, Chapter IV, Section 2, Subsection 2.

<sup>144</sup> See e.g. Denmark, s. 4 of Act No. 161 of 12 April 1978 (conditions of employment, including dismissal); France, ss. L.122-45 (dismissal and penalties on grounds of race, origin, ethnic group, national origin, sex, family status, political opinions, trade union or like activities, religious belief), L.123-1(c) (any action concerning remuneration, assignment to particular jobs, qualifications, classification, advancement or reassignment on the ground of sex), L.140-2 (remuneration according to sex) of the Labour Code; Ireland, s. 3(4) of the 1977 Act (conditions of employment, including employment-related benefits, working conditions, treatment (footnote continued on next page)



other conditions are concerned, the legislations as a rule confine themselves to enacting a general provision that covers any other condition of work or of employment not expressly mentioned. Some legislation makes the employer responsible for providing for employees working conditions free of discrimination and harassment.<sup>145</sup> The information supplied gives a number of particulars of conditions of employment, viz. promotion, security of tenure, equal pay, equality of treatment for purposes of social security, and certain matters affecting working conditions.

## Promotion

108. The instruments of 1958, in referring to promotion as one of the elements of conditions of employment, establish the right of every person not to be subject to any discrimination based on such grounds as race, colour, sex, national extraction, political opinion, religion or social origin as regards promotion earned in the course of employment.<sup>146</sup> Many legislative provisions dealing with equality of opportunity and treatment refer expressly to the observance of this principle in the matter of promotion and forbid any discrimination based on certain grounds in the operation of systems of promotion.<sup>147</sup> The provisions of some labour codes define the

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(footnote continued from previous page)

in relation to overtime, shift work, short time, transfers, lay-offs, redundancies and disciplinary measures); Italy, Act No. 903 of 9 December 1977; United Kingdom, s. 4(2) of the 1976 Act (conditions of employment, including promotion, transfer, dismissal or any other benefit, facility or service granted or withheld on grounds of race).

<sup>145</sup> See e.g. Canada, United States.

<sup>146</sup> This individual right is recognised in Article 7(c) of the International Covenant on Economic, Social and Cultural Rights, which states that everyone has the right to the enjoyment of just and favourable conditions of work which ensure, in particular, "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence". This right is recognised in the labour legislation of a number of countries, e.g. Spain, Portugal.

<sup>147</sup> See e.g. Spain, s. 8(2) of Act No. 8 of 10 March 1980 to promulgate the Workers' Charter: "Occupational categories and the criteria for promotion within the undertaking shall be governed by rules common to workers of both sexes", LS 1980-Sp. 1; Portugal, s. 10 of Legislative Decree No. 392/79 of 20 September 1979: "Women workers shall be guaranteed the same opportunities as men for following a career enabling them to reach the highest level in the occupation concerned [including] the right to hold managerial posts and to change from one occupation to another", LS 1979-Por. 3.

meaning of "promotion"<sup>148</sup> and give prominence to the connection between promotion and vocational training.<sup>149</sup>

109. To be able to exercise effectively the right to promotion, one must be familiar with the rules and criteria that determine the selection and choice of the persons who may be promoted. With the exception of those applicable to the public service, the rules and criteria governing promotion are rarely specified in the legislation and regulations.<sup>150</sup> In some countries collective agreements indicate broadly the procedure to be observed for purposes of promotion and specify the criteria to be applied in choosing candidates for promotion.<sup>151</sup> In other countries some particulars concerning promotion are given in the work rules in force within enterprises. In some countries, the courts may monitor the conduct of competitive examinations and their results.<sup>152</sup> The criteria commonly mentioned concern performance, qualifications, merit,

<sup>148</sup> Angola, s. 88 of the General Labour Act: "The expression 'promotion' means the placement of a worker in a job in a higher grade carrying a higher rate of wages", LS 1981-Ang. 1.

<sup>149</sup> Spain, s. 22 ("Advancement and vocational training") of the Workers' Charter; France, s. L.931 of the Labour Code, as amended by Act No. 85-772 of 25 July 1985; the provision appears in the chapter dealing with individual promotion and leave for vocational training.

<sup>150</sup> See, however, Angola, ss. 88(2) et seq. of the General Labour Act; Brazil, s. 461(2) and (3) of the consolidated labour laws of 1985, LS 1985-Bra. 1. Where the staff is organised on the basis of regular promotion by seniority, promotions must be in accordance alternatively with merit and seniority; Ecuador, s. 325 of the Labour Code, LS 1978-Ec. 1 (applies to transport undertakings only); Mexico, ss. 154 et seq. of the Federal Labour Act. Pursuant to s. 157 of that Act the conciliation and arbitration board has authority to deal with disputes arising between an employer and a worker concerning the application of the provisions relating to promotion, the main criteria for it being seniority and merit; Romania, s. 75(1) of the Labour Code, LS 1972-Rom. 1.

<sup>151</sup> See, e.g., Honduras, clause 20 of the collective agreement between the Tela Railroad Company and its trade union, La Lima, 16 April 1980; clause 29 of the collective agreement between the National Electric Energy Corp. and its trade union, Tegucigalpa, 1981.

<sup>152</sup> e.g. Italy: The Court of Cassation considered that, while the provisions of the collective agreement or the staff regulations of the enterprise required certain objective criteria to be respected, the evaluation of these criteria in each particular case and their application in respect of promotion were left to the discretion of the employer. Nevertheless, in accordance with ss. 1175 and 1375 of the Civil Code, the exercise of that discretion was subject to observance of the principles of good faith and the correct execution of obligations laid down in collective agreements. The employer had the duty to state the reasons for his or her decisions in such matters in order both to enable the workers to assert their rights and to satisfy the requirements of judicial review. Court of Cassation (Labour Chamber), 22 February 1985, No. 1603.

seniority, experience, past training, but also fitness to perform the tasks of the new post. In the public service the criteria for promotion are much the same but they are somewhat differently weighted in the evaluation carried out for the purposes of promotion. Seniority still looms quite large among the criteria taken into account, although it has lost some of its importance as compared with the criteria of merit and qualifications.<sup>153</sup> The equitable application of most of these criteria should not lead to direct discrimination in promotion, but in order to forestall indirect discrimination, it may be necessary to review, in the light of the principle laid down in the Convention, the choice and weighting of the elements to be taken into account in evaluating merit and qualifications.<sup>154</sup>

110. The functioning of a system of promotion free of discrimination is at the core of the questions relating to vertical occupational segregation; this segregation affects primarily women but in some countries affects also minorities that are obviously distinguishable by race, colour or national origin and even minorities whose distinctive characteristic is their religion or social origin. In France a survey has shown that the share accounted for by women in supervisory positions in the banking sector was only between 11 and 16 per cent, even though this sector employs large numbers of women (between 55 and 65 per cent of the total staff is female). In addition, where women succeed in rising to higher grades it takes them much longer to do so than it takes their male colleagues. The survey has also shown that the number of women in senior positions has increased, in percentage terms, much faster than that of men.<sup>155</sup> In the USSR a survey carried out in 1976 showed that in industry women accounted for 70-80 per cent of the workers in the first and second categories of skill, and for 5-35 per cent in the fifth, sixth and higher categories; 9 per cent of works managers were women.<sup>156</sup> By means of continuous training and of facilities granted to persons with

<sup>153</sup> See ILO: Recruitment, training and career development in the public service, Report II, Joint Committee on the Public Service, Third Session, Geneva, 1983, pp. 63 et seq.; see, however, Greece, ss. 159-182 of the Public Service Code (promotion by selection or according to seniority).

<sup>154</sup> Norway: In the report for 1984 the Ombud stated that in very many cases the opportunities open to men and women are not equivalent where the employer is guided by traditional considerations in choosing persons for promotion. Already in the 1981 report the Ombud had referred to a general tendency to underrate the qualifications of women.

<sup>155</sup> ILO: Social and Labour Bulletin, 3/81, pp. 352 and 353. The report on the survey offers an explanation for the differences in career between the sexes: women tend to be overlooked for promotion, lose interest in advancement and are subsequently criticised for lack of ambition - with the result that management is even more reluctant to promote women's career development.

<sup>156</sup> N.M. Shiskan: "Trud zhenshin v usloviakh razvitogo sotsialisma", Shtiintsa publications, Kishinev, 1976, pp. 137-145.

family responsibilities to enable them to receive continuous training it should be possible to provide more equitable opportunities of promotion. So far as the public service is concerned the Committee referred, in its General Survey on equal remuneration, to the high proportion accounted for by women in the public service and drew particular attention to the imbalance between the sexes at all grades and to the fact that in some countries women are heavily represented in non-permanent and auxiliary positions.<sup>157</sup> In several countries programmes have been set up for rectifying this imbalance; these programmes will be more fully discussed in the part of the present survey which deals with positive action. Owing to the large share accounted for by the public service in total employment, but also because a State which ratifies the Convention is committed to apply the policy of equality of opportunity and treatment "in respect of employment under the direct control of a national authority", the results of systems of promotion used in the public service have a considerable demonstration value and serve as models.

111. From the information available it appears that the mode of computing seniority may involve a certain differentiation that affects the opportunities of promotion of women.<sup>158</sup> Certain interruptions of working life on account of pregnancy or motherhood are not always taken into account in the calculation of seniority. Where seniority is a material factor for purposes of promotion, women workers whose employment has been interrupted for such reasons will be penalised to the extent that their seniority in the service or undertaking is

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<sup>157</sup> General Survey of 1986 on equal remuneration, paras. 199-201; see also Report II of the Joint Committee on the Public Service, op. cit., pp. 72-74: "While a steady increase in the number of female employees in the public service is to be found in most countries, this trend has not been accompanied by satisfactory progress in their representation at the middle and higher levels or a more equitable distribution of women among the various statutory categories. The disadvantageous status of women results in a lack of representation in senior posts, whereas they account for the large majority in lower-grade jobs ...".

<sup>158</sup> See e.g. Ireland, para. 6(2) of the Employment Equality Agency's Code of Practice: requirements such as age limits or uninterrupted service may in practice give rise to indirect discrimination. See also Labour Court, Department of Posts and Telegraphs v. 35 Women Telephonists (1982), DEE 3/82. The female complainants had been obliged to resign from their jobs because they had married before 1973, at a time when a woman who entered into marriage was debarred from employment in the public service. The relevant provision was repealed in 1973 and the complainants were reinstated. However, their pre-1973 service was disregarded in the calculation of seniority. The Labour Court held that this had been a case of indirect discrimination, that the consequences remaining from earlier discrimination ought to be rectified and that consequently the women telephonists concerned ought to be deemed never to have suffered an interruption of their employment relationships.

curtailed by the period of the interruption. In several countries specific provisions have been enacted to rectify such indirect discrimination; these state that a period of absence from work on account of childbirth or pregnancy or on account of sickness due to pregnancy or childbirth is to be treated as a period of employment for purposes of advancement in the occupation.<sup>159</sup>

### Security of tenure

112. In the context of efforts to promote equality of opportunity and treatment in employment, the concept of security of tenure denotes in effect the guarantee that dismissal must not take place on discriminatory grounds, but must be justified by reasons connected with the worker's conduct, his or her ability or fitness to perform his or her functions, or the strict necessities of the operation of the undertaking concerned. The question of the ending of the employment relationship is dealt with in the Termination of Employment Convention (No. 158) and the Recommendation (No. 166), 1982 on the same subject.<sup>160</sup> The Convention applies to all branches of economic activity and to all employed persons, except workers engaged for a specified period, or for a period of probation, or on a casual basis for a short period,<sup>161</sup> and it provides that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.<sup>162</sup> Pursuant to Article 5(d) the following, *inter alia*, do not constitute valid reasons for termination: "race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin". In some countries, the dismissal of a

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<sup>159</sup> See e.g. Italy, s. 3 of Act No. 903 of 9 December 1977. The section in question contains the proviso "unless special requirements are laid down for the purpose by collective agreement".

<sup>160</sup> By 23 March 1988 the Convention had been ratified by eight member States: Cyprus, Malawi, Niger, Spain, Sweden, Venezuela, Yugoslavia, Zaire.

<sup>161</sup> It should be noted that, owing to the structure of the labour market in many countries, a large share of the workforce recruited on a casual basis is accounted for by women and young persons.

<sup>162</sup> See Court of Justice of the European Communities, Judgement of 16 February 1982, Burton v. British Railways Board, 19/81 EEC: in the context of Directive 76/207 the word "dismissal" must be widely construed so as to include termination of the employment relationship between a worker and his or her employer, even as part of a voluntary redundancy scheme. It follows that the principle of equality of treatment applies to eligibility for a voluntary redundancy benefit payable by an employer to a worker who wishes to leave his or her employment.

worker on the discriminatory grounds of political opinion or religion is void.<sup>163</sup>

113. A distinction must be drawn between individual dismissals and collective dismissals or redundancies for economic reasons. In the latter case, the protection against discrimination should cover indirect discrimination that may be due to the criteria specified for the purpose of determining the order of redundancies; such criteria are in many cases specified in collective agreements. In that respect it would be necessary to ensure that apparently neutral terms and conditions that are applicable without differentiation do not lead to indirect discrimination affecting a category of persons distinguishable by one of the grounds referred to in the Convention. The labour codes of several African countries specify criteria of selection in the event of redundancy for economic reasons: skill and seniority are mentioned, but so far as seniority is concerned, the number of years of service is increased by one year for married persons and by an additional year in respect of each dependent child.<sup>164</sup> In one European country which has ratified the Convention, the legislation concerning redundancies provides that the employer is to make a "social selection" among workers in identical circumstances in cases where redundancies are unavoidable in consequence of a restructuring or partial closure of the business. The criteria for this selection are, essentially, age, length of service, dependants, and ability to obtain alternative employment. In such situations, cases of inequitable treatment between the sexes may occur if too much weight is given to seniority in so far as, statistically, women have less seniority than men.<sup>165</sup> In Australia a tribunal ordered a company to recalculate the level of seniority of some women workers who claimed that the company's practices were discriminatory in hiring and in the retrenchment of women due to the company's policy under which women were hired last and fired first.<sup>166</sup> Such treatment may also occur by reason of family circumstances and of the weight given to the idea that a woman's earnings are merely a "supplementary income" in a household where the

<sup>163</sup> See e.g. Italy, s. 15 of Act No. 300 of 20 May 1970. The court must order the reinstatement of the worker (s. 18).

<sup>164</sup> Mauritania, s. 20 of Act No. 63-023 of 23 January 1963; Senegal, s. 47 of the Labour Code, LS 1987-Sen. 1.

<sup>165</sup> Ireland, s. 9.5 of the Code of Practice cited earlier: under "last in, first out" agreements, in case of staff reductions discrimination may occur if the members of one sex tend to have less seniority owing to earlier discrimination in the matter of access to employment and promotion. See footnote 155 above.

<sup>166</sup> Equal Opportunity Tribunal of New South Wales, 20 October 1986, Donka Najdovska and others v. Australian Iron and Steel Pty Ltd.; see also Social and Labour Bulletin, 2/87, p. 349. The company, it was claimed, had left women on job waiting lists for years at a time, while continuing to recruit men. This meant that the women as a whole had less seniority than the men and were obviously directly in the firing line under a retrenchment policy of "last in, first out".

man is working and is regarded as the head of the household.<sup>167</sup> Agreements that stipulate that married women or women who are not heads of household may be declared redundant first would be inconsistent with the Convention. Many labour codes contain provisions that declare void, inter alia, any clauses in collective agreements that conflict with the principle of equality. Nevertheless, in this field, in which the contractual freedom of the parties prevails, the co-operation of employers' and workers' organisations must be sought with a view to eliminating any factors of indirect discrimination that might appear in collective agreements. In Italy the legislation provides that the quantitative male-female ratio may not be modified so as to prejudice women in the course of a company's reorganisation.<sup>168</sup> Such a measure, by establishing a "floor", is designed to forestall the possibility that the criteria for deciding which of the workers are to be declared redundant might be based directly or indirectly on sex, even though the measure does not explicitly state that potentially discriminatory action affecting specific persons is prohibited.

114. A provision fixing a different age of mandatory retirement for men and women is interpreted as discriminatory in some countries and as a protective measure in others.<sup>169</sup> In Japan the Supreme Court has upheld the claims of female employees whose employment had been terminated because they had passed the mandatory retirement age fixed in the work rules of an undertaking which prescribed a different age of retirement for men and women; the female plaintiffs contended that the rule in question was discriminatory and hence inconsistent with the Constitution and the legislation.<sup>170</sup> The Court of Justice of the European Communities has ruled that a contractual clause in conditions of employment that provides for termination of employment by reason of retirement and that differentiates between the sexes is discriminatory. The Court held that the discrimination concerned the fixing of an age limit with respect to the termination of an employment relationship within the meaning of article 5 of Directive

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<sup>167</sup> Belgium, Labour Tribunal of Charleroi, 12 November 1984, Bekaert Cockerill: "by providing for the establishment of a system of part-time employment for 'all women who are not heads of household' the parties to the agreement ... did in fact intend to apply a discriminatory measure based on membership of a particular sex ...; the dismissal of thirteen female complainants is open to the same objection". The works agreement which had led to the dismissal had not been registered and hence could not be declared void. The Tribunal ordered the payment of damages in lieu of reinstatement.

<sup>168</sup> Act No. 863 to transform into an Act, with amendments, Legislative Decree No. 726 of 30 October 1984 concerning urgent measures for maintaining and increasing employment.

<sup>169</sup> The argument most commonly advanced is based on the idea that women are doing two jobs: the paid job in employment and the work at home and in the family, which is recognised as such by society.

<sup>170</sup> Supreme Court of Japan, Judgement of 29 August 1975, cited in International Labour Review, 1978, Vol. 117, No. 1, p. 59.



76/207/EEC, and not the consequences of the fixing of an age limit for the purpose of social security benefits within the meaning of article 7 of Directive 79/7/EEC.<sup>171</sup>

115. One specific aspect - important for its practical consequences - of security of tenure is protection against measures of reprisal taken with respect to a person who lodges a complaint with the appropriate body, or who institutes proceedings to enforce his or her rights in the matter of equality of treatment and opportunity, or who is a party to such proceedings, e.g., as a witness.<sup>172</sup> This protection may be provided for in general provisions forbidding the use of measures of retaliation for the purpose of preventing workers from exercising their rights.<sup>173</sup> An express provision protecting workers against dismissal by reason of the lodging of a complaint or the institution of proceedings concerning cases of discrimination based mostly, if not always, on grounds mentioned in the Convention

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<sup>171</sup> Judgements of the Court of Justice of the European Communities dated 26 February 1986, Marshall, 152/84, Beets-Proper, 262/84. As regards the consequences of a differentiation in age limit in the matter of social security see the Judgement (cited earlier) dated 16 February 1982 in the case Burton v. British Railways Board: The determination of a minimum pensionable age for social security purposes which is not the same for men as for women does not amount to discrimination prohibited by Community law. A draft Directive had been prepared, dated 5 May 1982, which would have left open the option under article 7 of Directive 79/7/EEC of 19 December 1978 for a State to exclude from the scope of the Directive the fixing of an age limit for the purpose of eligibility to a retirement pension, and which would have provided that the class of provisions conflicting with the principle of equality of treatment should include those discriminating between the sexes for the purpose (among others) of retirement age. On 10 December 1982 the Council of the European Communities issued a recommendation (Official Journal No. L357/27 of 18 December 1982) which was summarised by the Commission in the following terms: the Member States are recommended to acknowledge flexible retirement, i.e. freedom for employed persons to choose their age of retirement themselves. The Commission's proposal that the choice should be exercisable as from the same age by men and by women was not, however, adopted by the Council.

<sup>172</sup> Article 5(c) of the Termination of Employment Convention, 1982 (No. 158) provides that "the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent authorities" does not constitute a valid reason for termination. The protection against reprisals provided for in the legislation in force in various countries covers not merely termination but also promotion and other conditions of employment. See also Chapter V, Section 2.

<sup>173</sup> Guatemala, s. 10 of the Labour Code, LS 1961-Gua. 1; Honduras, s. 10 of the Labour Code, LS 1959-Hond. 1; Japan, s. 104 of the Labour Standard Law, LS 1947-Jap. 3.

appear in the legislation of some countries.<sup>174</sup> As a general rule the specific provisions enacted cover only certain grounds of discrimination, such as sex<sup>175</sup> or race,<sup>176</sup> and in some cases they deal with discrimination only in so far as it may affect some particular aspect of the conditions of employment, such as equality of remuneration for men and women.<sup>177</sup> Article 7 of the Directive of the Council of the European Communities on the implementation of the principle of equal treatment for men and women provides: "Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."<sup>178</sup> In some of the member States of the EEC dismissal by way of reprisal is unlawful and may, pursuant to the provisions concerning equality of opportunity and treatment, be punishable by a fine and give rise to an order for the payment of cash compensation.<sup>179</sup> In other cases, a notice of dismissal given by way of reprisal is deemed to be void and the

<sup>174</sup> Canada, Quebec, s. 83(1) of the Charter of Human Rights and Freedoms: "It is unlawful to attempt to apply or to apply reprisals against a person, a group of persons or a body that has in good faith applied for an inquiry, given evidence or otherwise participated in an inquiry carried out by or on behalf of the Commission"; United States, s. 704(a) of the Civil Rights Act, 1964 (does not, however, refer to social origin or to political opinion).

<sup>175</sup> See e.g. Australia, s. 94 of the Sex Discrimination Act 1984; New Zealand, s. 15 of the Equal Pay Act 1972, LS 1972-NZ 1; United Kingdom, s. 4 of the 1975 Act; Sweden, s. 4(3) of the Act of 17 December 1979.

<sup>176</sup> United Kingdom, s. 2 of the 1976 Act which (like the 1975 Act) defines as "discrimination by reprisal" the fact of treating the victimised person less favourably than would be treated any other person in like circumstances, on the ground that the person victimised is suspected of having brought or has brought proceedings under the Act, or has given evidence or information in connection with such proceedings, or has alleged that an act has been committed which would amount to a contravention of the Act. Reprisals adopted against a worker in cases covered by the Act are themselves deemed to be discriminatory within the meaning of the Act.

<sup>177</sup> Ghana, s. 70 of the Legislative Instrument to make Labour Regulations, LS 1979-Gha. 1C; Jamaica, s. 6(3) of the Equal Pay Act 1975, LS 1975-Jam. 2. See also General Survey of 1986 on equal remuneration, para. 169.

<sup>178</sup> Council Directive 76/207 of 9 February 1976.

<sup>179</sup> Federal Republic of Germany, s. 612(a) of the Civil Code, as amended by the Act of 13 August 1980; Belgium, s. 136 of the Act of 4 August 1978; Denmark, s. 9 of Act No. 161 of 12 April 1978; France, ss. 123-5 of the Labour Code; Greece, s. 6(1) of Act No. 1414; Ireland, ss. 25 and 26 of the 1977 Act; Luxembourg, s. 8 of the Act of 8 December 1981; Netherlands, s. 1637(i)(j) of the Civil Code, as amended by the Act of 1 March 1980; Portugal, s. 11 of Legislative Decree No. 392/79 of 20 September 1979.

employee may obtain reinstatement; if the employee, or in some cases the employer, refuses reinstatement, the employer is ordered to pay compensation.<sup>180</sup> In Ireland, an employer who dismisses an employee solely or mainly because that employee did in good faith anything specified in the provisions concerning equality in employment is guilty of an offence and liable to a fine.<sup>181</sup> If after investigation the court is satisfied that the complaint is well founded it may order the employee's reinstatement or re-engagement and direct the employer to pay compensation equivalent to not more than 104 weeks' remuneration.<sup>182</sup>

116. In some cases political opinion is taken into account in connection with the termination of the employment relationship or with dismissal from the public service.<sup>183</sup> Measures of termination or dismissal have been adopted under special provisions enacted shortly after a military coup d'état<sup>184</sup> or under emergency powers.<sup>185</sup> In

<sup>180</sup> Belgium, France, Ireland, Netherlands.

<sup>181</sup> S. 25(1) of the 1977 Act.

<sup>182</sup> *ibid.*, s. 26(1)(d).

<sup>183</sup> See Chapter I, Section 3 above, paras. 57 et seq.

<sup>184</sup> See e.g. Chile, Report of the Commission appointed under article 26 of the Constitution of the ILO to examine the observance by Chile of the Hours of Work (Industry) Convention, 1919 (No. 1) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (GB.196/4/10), paras. 38, 116, 157-181. "The Commission has reached the conclusion that the measures taken by the new Government, after the change of regime on 11 September 1973, to facilitate the dismissal from their employment of those persons who, in the new situation created in the country, were considered by the Government to have a disruptive effect on production in the private sector, or to be a danger to the security of the State, were not accompanied by the necessary guarantees to prevent these measures being used to dismiss workers on the basis of their political opinion." (para. 174). "Having completed its investigation of the facts and its examination of the question submitted to it by the Governing Body, and on the basis of the foregoing, the Commission has reached the conclusion that these special measures taken by the Government had results which were inconsistent with Article 2 of the above-mentioned Convention, according to which each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." (para. 175).

<sup>185</sup> Turkey, RCE 1983, pp. 224 and 225; RCE 1984, pp. 268-270; RCE 1985, pp. 294-296; RCE 1987, pp. 376-378. S. 2 of Martial Law No. 1402, as amended by Act No. 2301 of 19 September 1980, makes it mandatory for the competent authorities to execute immediately every request of the Martial Law Commanders to transfer or dismiss employees of the central Government and to suspend or dismiss officials in local administrations whose services are considered harmful from the point

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Czechoslovakia workers in various undertakings have been dismissed because they had signed or expressed support for a document criticising government policy; the fact of signing or expressing support for such a document is hardly capable of justifying exceptions to the principal protection accorded by the Convention as regards political opinion.<sup>186</sup> In the Federal Republic of Germany, legislative and other provisions concerning the duty of faithfulness to the free democratic basic order are applied to exclude from service officials and employees in the absence of specific conduct inconsistent with loyalty, e.g., for taking part in the activities of lawful political parties.<sup>187</sup>

117. In the Islamic Republic of Iran persons adhering to a certain religious belief are excluded from the public service. Measures have been adopted for dismissing members of the Baha'i religion also from public and private enterprises.

#### Equal remuneration

118. With regard to equality of remuneration it should be recalled that the principle of equal remuneration for men and women workers for work of equal value is laid down in the Equal Remuneration Convention (No. 100), supplemented by Recommendation No. 90 both of 1951, on the same subject. In its General Survey of 1986 on equal remuneration the Committee has pointed out that equal evaluation of work and equal entitlement of women and men to all elements of remuneration cannot be achieved within a general context of inequality, and that the connection between the principle of Convention

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of view of general security, law and order or public safety, or whose work is not considered necessary. A large number of workers in state enterprises and of teachers have been dismissed by virtue of that provision on "ideological" grounds. Action has since been taken to review the case of the dismissed teachers and, possibly, to reinstate them: this process is still unfinished.

<sup>186</sup> Report of the Committee set up to consider the representation presented by the International Confederation of Free Trade Unions under article 24 of the Constitution alleging non-observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by Czechoslovakia, ILO, Official Bulletin, Vol. LXI, 1978, Series A, No. 3, Supplement. See also RCE 1979, pp. 182 and 183; RCE 1980, pp. 169-171; RCE 1981, pp. 172-174; RCE 1982, pp. 195-199; RCE 1983, pp. 211-213; RCE 1984, pp. 260-262; RCE 1985, pp. 284-287. The Committee has noted that the dismissals in question and relevant judicial decisions were based on the fact that the workers concerned had signed or supported the manifesto known as "Charter 77".

<sup>187</sup> Report of the Commission of Inquiry appointed under article 26 of the Constitution of the ILO to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, ILO, Official Bulletin, Vol. LXX, 1987, Series B, Supplement 1, paras. 582-594.

No. 100 and that of Convention No. 111 is paramount in this respect.<sup>188</sup> The gap between the earnings of men and those of women with comparable qualifications is attributable mainly to such factors as the likelihood of women to be employed in the least well paid branches of activity and occupations or the differences between women's and men's occupational careers which follow from the difficulty of reconciling work and motherhood, rather than to differences of remuneration between men and women doing work of equal value. Measures to put an end to the segregation of jobs, to deal with the problem of the supposedly female occupations or to ensure equality for workers with family responsibilities are steps towards the implementation of Convention No. 111 and Convention No. 156. Prominent among further measures that may contribute to equality of remuneration are those that ensure to a worker employed under a temporary contract of employment remuneration equal to that which the enterprise using her or his services would pay, after a probationary period, to a worker with equivalent qualifications who holds an equivalent job.<sup>189</sup>

119. The principle of equal remuneration for work of equal value without discrimination on the grounds of race, colour, national extraction, social origin, religion, or political opinion is laid down in many labour codes, at least as regards some of these grounds. As for certain aspects of existing differences in wages between men and women, it appears that there are many extraneous causes of inequality, i.e. differences in pay merely reveal a more general situation that is traceable to access to education, access to vocational guidance, etc.

#### Social security

120. In the course of examining the application of the Convention the Committee has considered a number of measures adopted in the field of social security in connection with employment.<sup>190</sup> Bearing in mind Article 5 of the Convention, any distinction made on the basis of

<sup>188</sup> General Survey of 1986 on equal remuneration, para. 100; as regards the need for a comprehensive approach to problems in this field, see also *ibid.*, paras. 250 to 254.

<sup>189</sup> See *France*, Labour Code, ss. L.124-4-2 and L.140-2(2); see also Court of Cassation (Social Affairs Chamber), 16 July 1987, *Dame Gomicchon v. Société des établissements Delmazure*.

<sup>190</sup> Paragraph 2(b)(vi) of the Recommendation mentions, among the conditions of employment, social security measures and welfare facilities and benefits provided in connection with employment. The Convention refers to the concept of "terms and conditions of employment", which covers all matters connected with employment (ILC, 40th Session, 1957, Report VII(1)), Seventh item on the agenda, Discrimination in the field of employment and occupation, pp. 3, 30 and 35 (item 5(g) of the questionnaire) which are specified in the detailed enumeration given in the Recommendation. During the first discussion at the 40th Session of the Conference, 1957, the reference to social security was introduced into the detailed enumeration given in the draft Recommendation on the basis of an amendment proposed by

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sex which is not justified by special measures of protection or assistance either provided for in other International Labour Conventions or Recommendations, or generally recognised as necessary, should be eliminated.<sup>191</sup> In the field of social security in connection with employment, cases of discrimination on grounds other than sex have also been noted by the Committee.<sup>192</sup> Under the procedure for the supervision of ILO standards a number of governments have supplied particulars, in their reports on the application of Convention No. 111, of measures adopted in order to ensure equal treatment for men and women in the field of social security in connection with employment. The Committee has noted with satisfaction the various adjustment and harmonisation measures adopted in some countries in order to eliminate direct or indirect discrimination based on sex or marital status.<sup>193</sup> These adjustment and harmonisation measures concern, inter alia, the concepts of "head of family" and "dependants", differences in the conditions governing the grant of certain benefits, differences as regards the burden of proof and differences in the mode of calculating, and in the amount, of certain benefits. The Council of the European Communities has adopted two Directives on the implementation of the principle of equal treatment for men and women in matters of social security.<sup>194</sup>

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the Worker members. (Committee on Discrimination, 1957, PV.12, p. XIII/3; ILO, Discrimination in the field of employment and occupation, ILC, 42nd Session, 1958, Report IV(1), Fourth item on the agenda.) See also General Survey, 1963, para. 91 and General Survey, 1971, para. 37.

<sup>191</sup> A study of specific international standards on this subject might be undertaken following its classification among possible subjects for new instruments, see Report of the Working Party on International Labour Standards, ILO, Official Bulletin, Vol. LXX, 1987, Series A, Appendix III, para. 11.

<sup>192</sup> See General Survey, 1963, para. 91 and General Survey, 1971, para. 37.

<sup>193</sup> Belgium, RCE 1983, pp. 205 and 206, RCE 1985, pp. 280 and 281; Netherlands, RCE 1983, pp. 221 and 222, RCE 1986, pp. 273 and 274.

<sup>194</sup> Council Directive No. 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The adoption of specific measures concerning equal treatment for men and women in social security matters had been expressly envisaged in article 1, para. 2 of Directive No. 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and working conditions; Council Directive No. 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive No. 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (in particular art. 5).

Directive No. 79/7/EEC applies only to statutory social security schemes (other than those concerning survivors' benefits and family allowances). It requires that there must be no discrimination based on sex, either directly or indirectly, by reference in particular to marital status or family status, as regards both contributions and benefits. It provides in addition that the application of the principle of equal treatment shall be without prejudice to the provisions relating to the protection of maternity. The other Directive (No. 86/378/EEC) applies to the working population as a whole (including self-employed workers) and covers all compulsory or optional schemes that are intended to supplement or replace the statutory schemes. The scope of the principle of equality covers the field of application of the schemes, the conditions of access to the schemes, contributions, and the calculation of benefits. The Directive makes provision for measures of implementation: for measures declaring void any discriminatory provisions, for measures prohibiting the approval or extension of discriminatory provisions, for the establishment of appellate bodies, and for measures of protection against reprisals.

#### Other conditions of employment

121. Measures for the protection of the worker's privacy play a part in the application of the principle of equality of opportunity and treatment in employment and occupation. The legislation of Italy contains a number of provisions for protecting certain aspects of the worker's private life that might lead to discrimination in employment; under these provisions it is unlawful for an employer to carry out or cause to be carried out inquiries into a worker's opinions or beliefs or to carry out checks (otherwise than through specialised bodies) of a worker's physical aptitude for work.<sup>195</sup> In some of the states of the United States legislation has been enacted, or special provisions have been added to existing legislation, concerning the right of workers to consult their personnel files kept by the employer.<sup>196</sup> Most of these provisions apply to the public and to the private sector. In the event of disagreement concerning some data appearing in the file, the worker may in certain cases ask for rectification. If the worker and the employer cannot reach agreement concerning the data in dispute, or the possible amendment of the data, some legislative provisions authorise the worker to submit a statement in writing or an explanation which will be entered in the file.<sup>197</sup> In some cases, considerations concerning the protection of the employee's private life have led to the adoption of measures for prohibiting the use of certain kinds of tests in connection with the employment relationship, for example the use of lie detection

<sup>195</sup> Italy, ss. 5 and 8 of Act No. 300 of 1970.

<sup>196</sup> See e.g. Alaska, California, Delaware, Illinois, Massachusetts, Nevada, New Hampshire, Rhode Island.

<sup>197</sup> Delaware, Illinois, Massachusetts, New Hampshire.



tests.<sup>198</sup> Generally, such provisions specify that the worker has the right to refuse to submit to a lie detection test, or that no one may require a worker or a candidate for employment to submit to such a test, or else declare it unlawful to interrogate a worker about, e.g. his or her religious beliefs or political affiliation.

122. From the information available it is apparent that in recent years there has been a great increase in part-time work in the industrialised market economy countries.<sup>199</sup> Part-time employment is concentrated mainly in such sectors as the service industries, which generally account for more than half of the part-time workers. It is particularly women workers,<sup>200</sup> young workers and older persons who are engaged in part-time employment. Because of certain constraints affecting women who have family responsibilities, and also because they have less latitude as regards the job, hours of work and the place of work - particularly if they have difficulty in arranging for their children to be taken care of at a reasonable cost - there is reason to believe that in many cases part-time employment is involuntary.<sup>201</sup> In most cases part-time employment is characterised

<sup>198</sup> See e.g. Canada, New Brunswick, s. 44.1 of the Employment Regulations Act. The Act defines the lie detection test as an analysis, examination, interrogation or test carried out by means of one or more mechanical, electrical, electro-magnetic, electronic or other apparatus, instrument or device for the purpose or ostensible purpose of evaluating a person's credibility. See also United States: in the years 1980-86 a large number of states adopted legislation strengthening the ban on the use of lie detection tests for workers, or candidates for employment, as a condition of employment (California, Georgia, Hawaii, Iowa, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Tennessee, Washington, West Virginia, and others).

<sup>199</sup> In 1985 the share of part-time workers in the total working population was 28.6 per cent in Norway, 24.6 per cent in Sweden, 23.7 per cent in the Netherlands, 21.2 per cent in the United Kingdom, between 15 and 19 per cent in Australia, Canada and the United States, and about 10 per cent in the Federal Republic of Germany, France and Japan. Part-time employment exists also (though on a lesser scale) in developing countries; in Tunisia, for example, s. 25 of the Act of 12 December 1983 issuing public service regulations repealed provisions that had authorised half-time work for women only.

<sup>200</sup> The share accounted for by women in total part-time employment is 92 per cent in the Federal Republic of Germany, 90 per cent in the United Kingdom, 85 per cent in France, and 84 per cent in Sweden. In Australia, Canada and the United States part-time employees include more young persons, many of whom work while carrying on their studies.

<sup>201</sup> According to the OECD, from a statistical point of view, involuntary part-time working occurs when a worker is forced to take a part-time job instead of a full-time job because of the difficulty of finding the latter, OECD, Employment Outlook, Paris, 1983, p. 45. In the United States it is estimated that 536,000 women do part-time work (footnote continued on next page)

by lack of security of tenure,<sup>202</sup> irregular working hours, frequently work at night or on public holidays without the supplements payable in such cases to full-time workers, no pay increase according to seniority, no entitlement to paid leave or to other social benefits.<sup>203</sup> In view of these problems a number of countries have taken action to protect, in law and in practice, the interests of part-time workers and to ensure observance at least of the principle of proportionality in social matters.<sup>204</sup> No information is available on which to base an opinion concerning the relationship between this question and the application of the Convention in other countries.<sup>205</sup>

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because they have not found full-time jobs. In Australia the Office of the Status of Women has reported that, according to a survey carried out in 1982, 21 per cent of the women working between 10 and 30 hours a week would have preferred to work more hours.

<sup>202</sup> See e.g. Sweden: A person who works less than 17 hours a week is not entitled to unemployment insurance. ILO, General Report of the Advisory Committee on Salaried Employees and Professional Workers, Geneva, 1985, p. 26.

<sup>203</sup> See e.g. Federal Republic of Germany: In general the right to a pension accrues only to persons who work more than 20 hours a week; Denmark: a person working less than 15 hours a week is not entitled to a pension; United States: part-time workers do not qualify for the benefits available to full-time workers: health insurance, pension schemes and paid leave. Report of the Advisory Committee, 1985, cited above.

<sup>204</sup> See e.g. Australia, South Australia and Tasmania: According to the legislative provisions and arbitral awards, rights arising out of a relationship of part-time employment are to be determined pro rata; Colombia: under the Labour Code workers are entitled to the appropriate emoluments and guarantees irrespective of the length of the working day; Spain: remuneration and allowances payable to part-time workers are calculated on the same basis as for full-time workers, adjusted according to the hours worked; Norway: there is no distinction between full-time and part-time employees in agreements to which the Association of Employers in Commerce is a party; there are certain provisions aimed at preventing differential treatment of the two categories; Philippines: entitlements for part-time workers, including those relating to wages, social security benefits, medical care, workmen's compensation, paid leave and living allowances, are prorated to those of full-time workers. (Source: Advisory Committee's report, op. cit.)

<sup>205</sup> See however the following provisions adopted in the USSR: The Fundamental Principles governing the labour legislation of the USSR and the Union Republics (LS 1970-USSR 1), ss. 26 and 69 to 73, as amended and supplemented by the Decree of the Presidium of the Supreme Soviet of the USSR of 2 September 1987 granting additional benefits to pregnant workers and to women workers with young children; under s. 26, as amended, the administration is required to grant part-time work (footnote continued on next page)

123. Legislative provisions dealing with health and safety have as their object a reduction of all hazards for all workers, and lay down strict standards which apply regardless of personal circumstances. It is the duty of the undertaking to make every reasonable effort to create a safe working environment and safe working conditions. In Canada a tribunal having jurisdiction in human rights cases substantiated the claim of a complainant who wished to work without a hard hat, for the wearing of a hard hat was against his religious beliefs. The complainant argued that his refusal to wear a hard hat occasioned no risk to the public or to his fellow workers and that such risk as there might be was acceptable to him. The tribunal held that an individual was not obliged to compromise his or her religious principles unless there was justification for doing so, and that a safety policy conflicting with human rights legislation would not be reasonable within the meaning of the Labour Code.<sup>206</sup> The Human Rights Commission has used the concept of "the dignity of risk" to ensure that workers or persons seeking employment are allowed a certain degree of self-determination if the job involves risks to themselves that they are willing to take. The purpose of this concept is to temper the general approach of provisions concerning health and safety. The Human Rights Commission considers that it is possible to introduce a greater degree of self-determination into employment practices without posing a threat to the hard-won principle of a safe

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(either on a daily or a weekly basis) to such women as well as to women caring for a family member who is ill; the women receive proportionate wages. For other workers, the same conditions may be fixed by means of an agreement between the person concerned and the administration. Order No. 111/8-51 of 29 April 1980 by the State Labour and Social Affairs Committee of the All-Union Central Council of Trade Unions, to approve regulations respecting the procedure and conditions for employing women having children and working part time, LS 1980-USSR 2: "... The regulations lay down general and special provisions guaranteeing women more favourable conditions for combining their duties as mothers with occupational activity and their participation in social life." According to the Labour Code of the RSFSR (LS 1971-USSR 1), the fact that part-time work is involved shall not affect in any way [a worker's] annual leave entitlement, the calculation of his or her probationary period or any other rights connected with his or her employment (s. 49).

<sup>206</sup> Canada, Human Rights Tribunal, 22 September 1981, Bhinder v. Canadian National Railways (CNR). On appeal, the Federal Court of Appeal quashed the tribunal's decision, Canadian National Railways v. Bhinder and the Canadian Human Rights Commission. On further appeal to the Supreme Court, the Supreme Court, by a judgement dated 17 December 1985, dismissed the appeal of the appellants (Bhinder and Canadian Human Rights Commission v. CNR) and ruled that employers are not under an obligation to make reasonable adjustments to conform to the needs of workers or future workers. The Canadian Human Rights Commission is to prepare a report to Parliament on the implications of the Supreme Court's decision.

workplace. Where an individual is capable of performing a job, does not pose a risk to others and has made an informed choice that he or she is prepared to accept a degree of personal risk that does not entail unduly severe consequences for the employer, that individual should be given a chance. The alternative would be to accept barriers to employment, in the form of indirect discrimination, for certain persons who otherwise satisfy the requirements inherent in a particular job.<sup>207</sup>

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<sup>207</sup> Canadian Human Rights Commission, Annual Report 1981, p. 19.

## CHAPTER III

### INHERENT REQUIREMENTS OF A PARTICULAR JOB AND MEASURES NOT DEEMED TO BE DISCRIMINATION

#### General

124. As noted above,<sup>1</sup> not all distinctions, exclusions or preferences are deemed to be discrimination within the meaning of the Convention. The following measures are not deemed to be discrimination: measures based on the inherent requirements of a particular job (Article 1, paragraph 2); measures warranted by the protection of the security of the State (Article 4); and lastly, measures designed for protection or assistance (Article 5), including measures of protection and assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference (paragraph 1), and special measures, defined as non-discriminatory after consultation with representative employers' and workers' organisations, which are designed to meet the particular needs of persons who are recognised to require special protection or assistance (paragraph 2).

#### Section 1. Inherent requirements of a particular job

125. In the terms of Article 1, paragraph 2, of the Convention, "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination." The promotion of equality of opportunity and treatment envisaged by the Convention requires that access to training, employment and occupation be based on objective criteria defined in the light of academic and occupational qualifications required for the activity in question.<sup>2</sup> Normally, these requirements do not constitute discrimination under the terms of the Convention; they fall beyond its scope. Problems regarding the distinction between illegal discrimination and the inherent requirements of a particular job may arise in one of two ways: either a required qualification does not prove to be inherent to the job in

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<sup>1</sup> Chapter 1, Section 3, para. 30.

<sup>2</sup> See Portugal, s. 7(2) of the above-cited Legislative Decree No. 392/79 of 20 September 1979, which guarantees equality of opportunity and treatment for men and women as regards work and employment: "Recruitment for any post shall be exclusively based on objective criteria [...]".

question and constitutes discrimination even though explicit reference is not made to one or more of the grounds laid down in the Convention; or, a distinction based on one or more of these grounds is explicitly required as a necessary qualification. Thus, the exception allowed for in Article 1, paragraph 2, of the Convention, must be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide. Available information highlights two points of interest: the scope of this exception, i.e. a particular job, and the definition of "inherent requirements" of a particular job.

126. It appears from the preparatory work and the text of the Convention as ultimately adopted, that the concept of "a particular job" refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by the characteristics of the particular job, and be in proportion to its inherent requirements. Certain criteria may be brought to bear as inherent requirements of a particular job, but they may not be applied to all jobs in a given occupation or sector of activity, and especially in the public service, without coming into conflict with the principle of equality of opportunity and treatment in occupation and employment. In this connection, the Committee recalls the indication in a previous General Survey that although "it may be admissible, in the case of certain higher posts which are directly concerned with implementing government policy, for the responsible authorities generally to bear in mind the political opinions of those concerned, the same is not true when conditions of a political nature are laid down for all kinds of public employment in general or for certain other professions: for example, when there is a provision that those concerned must make a formal declaration of loyalty and remain loyal to the political principles of the regime in power".<sup>3</sup>

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<sup>3</sup> General Survey, 1963, para. 91. See also the report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by the Federal Republic of Germany, in Official Bulletin, Supplement 1, Vol. LXX, 1987, Series B, paras. 527-573; the Commission of Inquiry concluded that the measures taken in application of the duty of faithfulness to the free democratic basic order of all officials, without regard to their functions, did not remain within the limits of the restrictions authorised by Article 1, paragraph 2, of the Convention regarding the inherent requirements of particular jobs. See also German Democratic Republic, RCE 1987, pp. 360-365: the Government alleged that requirements of a political nature laid down in certain legislative provisions concerning the conditions for access to and exercise of various jobs "relate in fact to inherent requirements of the various jobs and not the ideological outlook of the person, or allegiance to a political party. The Committee notes that indeed, explanations provided by the Government relate to

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Thus, systematic application of requirements involving one or more of the grounds of discrimination envisaged by the Convention, to a category of persons defined by their status or their employment in an enterprise, irrespective of the aptitude of these persons to carry out the tasks assigned to them, does not correspond to the inherent requirements of a particular job.<sup>4</sup>

127. Likewise, the general exclusion of certain jobs or occupations from the scope of measures designed to promote the principle of equality of opportunity and treatment is contrary to the Convention, for it applies to all jobs and occupations.<sup>5</sup> Certain laws on equality of opportunity and treatment in employment and occupation leave certain categories of employment or jobs performed in certain conditions outside their scope, e.g. domestic employment or jobs in which the worker resides in the employer's

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inherent requirements of the job, e.g. the responsibility of a driving instructor for accident-free driving of the students, the responsibility of pharmaceutical workers for the welfare of people, the responsibility of lawyers for defending the rule of law as well as the interests of their clients; however, the ability to meet such a responsibility, by its very nature as an inherent requirement of a particular job, is part of the professional qualifications required of the persons concerned, and leaves the additional qualifications sought by the political requirements mentioned in the legislation to be determined". Czechoslovakia, RCE 1985, p. 286: "political opinions may be taken into account in connection with the requirements of certain senior administrative posts involving special responsibility in the implementation of government policy, but [...] if carried beyond certain limits, this practice comes into conflict with the provisions of the 1958 instruments which call for the pursuance of a policy designed to eliminate discrimination on the basis of, inter alia, political opinion".

<sup>4</sup> See the above-mentioned report of the Commission of Inquiry, para. 535: "The acceptance of the contention that the category 'official' in a given country could correspond to the concept of 'a particular job' in the Convention would, however, result in permitting entirely different exceptions from one country to another, determined not by the nature of the work or functions involved, but according to whether particular activities lay in the public sector and were entrusted to persons employed with the status of 'officials'. Great variations exist even in market economy countries in the extent to which given activities lie in the public or private sector, e.g. in transport, telecommunications, generation and supply of energy, education, health services, banking, etc. This situation also undergoes change in time, as particular activities are nationalised or privatised. [...] To make 'inherent job requirements' vary according to all such vagaries would be destruction of any common international standard".

<sup>5</sup> See Chapter II, Section 2, paras. 87 and 88.



home.<sup>6</sup> In the United Kingdom the provisions which excluded household employment and employment in enterprises of five or fewer employees regardless of the nature of their activity, from the scope of the 1975 Act on Sex Discrimination, have been repealed.<sup>7</sup> Noteworthy among provisions establishing an absolute exemption are those which concern charitable or philanthropic organisations, non-profit associations, church-run schools and organisations whose primary activity is to promote the well-being of a religious or ethnic group.<sup>8</sup> Unless such provisions stipulate that this exception must be based on an occupational requirement or qualification which is reasonable and bona fide in the circumstances,<sup>9</sup> the application of this exception may lead to discrimination as defined by the Convention. In the case of a religious, ethnic or political institution, the inherent requirements of a particular job must also be evaluated in the light of the actual bearing of the tasks performed on the institution's specific objectives.<sup>10</sup> The Committee has

<sup>6</sup> See, for example, Canada: Nova Scotia, section 8(4)(a) of the Human Rights Act; Newfoundland, section 9(6)(b) of the Human Rights Code; Saskatchewan, pursuant to the terms of section 2(e) of the Human Rights Code, persons employed or living in the home of their employer are not covered by the Code; federal legislation and the legislation of British Columbia, New Brunswick and Quebec do not provide for these exceptions; New Zealand, section 15(3)(c) and (d) of the 1977 Act on the Human Rights Commission.

<sup>7</sup> The 1986 Act on Sex Discrimination, s. 1(1).

<sup>8</sup> See, for example, United States, s. 702 of the above-cited 1964 Civil Rights Act, as amended in 1972: "This title shall not apply to ... a corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities."; Norway, s. 2 of above-cited Act No. 45 of 1978 on Equality between the Sexes: "This Act shall apply to all spheres, with the exception of the internal affairs of religious communities."

<sup>9</sup> This safeguard is provided for, for example, in Canada: Manitoba, s. 6(7) of the Human Rights Act; Nova Scotia, s. 6(4)(b) of the Human Rights Act; Ontario, s. 23(a) of the Human Rights Code.

<sup>10</sup> See the report of the Committee appointed to examine the claim presented by the Confederation of Trade Unions in Norway (LO), in accordance with article 24 of the Constitution, concerning non-observance by Norway of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), GB.222/18/23, para. 29: "... the Committee would suggest that in certain organisations, a consideration of the 'inherent requirements of the job' may involve such questions as whether there would be a risk that the pursuit of the institution's objectives would be frustrated, undermined or harmed by employing someone in a particular post who did not share the ideological views of the organisation. It is clear ... that distinctions made in these circumstances could only be justified under the Convention where the job itself carried special responsibilities". In this case, s. 55A of Act No. 4 of 4 February 1977 on Workers' (footnote continued on next page)

stated that criteria such as political opinion, national extraction and religion may be taken into account in connection with the inherent requirements of certain posts involving special responsibilities, but that if carried beyond certain limits, this practice comes into conflict with the provisions of the Convention.<sup>11</sup>

128. Many labour laws do not provide explicitly for any exception to the principle of equality of opportunity and treatment in employment. There are, however, many provisions which introduce distinctions based on sex or age, generally in the form of specific provisions applicable to women or young workers; in general, these provisions come under the exception provided for in Article 5 of the Convention. Legislation seeking to eliminate racial or sexual discrimination often contains explicit conditional exemptions to the principle of non-discrimination, in the form of either general provisions or lists of jobs or types of jobs for which a criterion such as sex may be retained as an inherent requirement; or they may combine both approaches, in which case a number of jobs are listed by way of illustration.

129. Among general provisions, some refer to the concept of bona fide or legitimate grounds to justify an exception to the principle of equality.<sup>12</sup> In other countries a general provision authorises a distinction in treatment based on one of the criteria envisaged by the Convention, where this criterion constitutes an essential requirement for the activity or a bona fide occupational qualification.<sup>13</sup> One of the difficulties encountered in the application of such general provisions resides in the burden of proof. As a general rule, the employer is required to prove that the special treatment is justified by objective reasons unrelated to a discriminatory criterion, or that this criterion constitutes an essential requirement for the work involved. In the Federal Republic of Germany, as regards disputes arising from distinctions based on sex, the worker is to establish facts that afford grounds for assuming the existence of discrimination, while it is for the employer to prove that differences

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Protection and Working Environment, as amended by Act No. 22 of 1982, provides for an exception which gives the employer the right to request information concerning the political, cultural or religious opinions of applicants for jobs which, by their nature, do not entail a special responsibility as regards the attainment of the institution's objectives; see also RCE 1984, pp. 265-266, and RCE 1987, pp. 370-371. See also Canada: decision of the Ontario Board of Inquiry in the matter of Gore v. Ottawa Separate School Board (Ont., 1971) to the effect that adherence to the Catholic faith did not constitute a reasonable occupational qualification for secretaries in the offices of principals of Catholic schools.

<sup>11</sup> See General Survey, 1963, paras. 42 and 91.

<sup>12</sup> See, for example, Austria, s. 2 of Act No. 290 of 27 June 1985 on Equality of Treatment.

<sup>13</sup> See, for example, Ireland, s. 17(1) of the above-mentioned Act of 1977 on Employment Equality.

in treatment are justified on grounds unrelated to sex.<sup>14</sup> Given the general nature of such provisions, information concerning their application in practice, and especially their interpretation by the courts, is required to ensure that they fall within the scope of the exception established in Article 1, paragraph 2, of the Convention.

130. Sometimes it is activities and not jobs, strictly speaking, which are presumed to qualify as exceptions when the worker's sex is held to be an essential requirement for the service in question. In certain countries the recruitment of one sex to the exclusion of the other for certain activities in the fields of fashion, art or entertainment is not deemed discrimination when this limitation is essential, inasmuch as the sex of the person concerned leads to a qualitative difference in the nature of the service or work.<sup>15</sup> In several countries a person's sex is considered an occupational requirement or a genuine occupational qualification for certain kinds of jobs. This is generally the case when physiological factors (strength and physical endurance generally being excluded),<sup>16</sup> or reasons of authenticity, aesthetics or tradition (as in the case of entertainment) inherent in the job, require a person of one sex rather than the other.<sup>17</sup> Pursuant to the terms of certain national legislation, considerations of decency and privacy may, in certain circumstances (physical contact, use of sanitary facilities, etc.), constitute a valid criterion for defining qualifications.<sup>18</sup> The nature of the establishment in which the work is to be performed is also mentioned as a valid criterion in determining qualifications.<sup>19</sup>

<sup>14</sup> S. 611a(1) of the Civil Code, as amended by the Act of 13 August 1980 on the equality of treatment between men and women at the workplace (LS 1980-Ger.F.R. 3); see also Netherlands, section 1637ij of the Civil Code, as amended by the above-cited Act on the equality of treatment between men and women.

<sup>15</sup> France, s. R.123-1 of the Labour Code (see also note 28 below: these provisions were adopted by decree, following consultation with employers' and workers' organisations); Italy, s. 1 of Act No. 903 of 9 December 1977 on Employment Equality; Portugal, s. 7(3) of the above-cited Legislative Decree.

<sup>16</sup> See Chapter II, Section 2, para. 85, note 128.

<sup>17</sup> Australia, s. 30(2)(a) and (b) of the 1984 Act on Sex Discrimination; Ireland, s. 17(2)(a) of the above-cited Act of 1977; United Kingdom, s. 7(2)(a) of the 1975 Act on Sex Discrimination.

<sup>18</sup> Australia, s. 30(2)(c), (d) and (e) of the above-cited Act; Ireland, s. 17(2)(b) and (d) of the above-cited Act: "... The sex of a person shall be taken to be an occupational qualification for a post in the following cases: (b) where the duties of a post involve personal services and it is necessary to have persons of both sexes engaged in such duties; ... (d) where either the nature of or the duties attached to a post justify on grounds of privacy or decency the employment of persons of a particular sex;" United Kingdom, s. 7(2)(b) and (e) of the above-cited Act.

<sup>19</sup> Ireland, s. 17(2)(c) of the above-cited Act; United Kingdom, s. 7(2)(d) of the above-cited Act: "(d) the nature of the establishment, or of the part of it within which the work is done, (footnote continued on next page)

In order to fall within the scope of the exception provided for in Article 1, paragraph 2, of the Convention, these criteria must in a concrete way correspond to the inherent requirements of a given job.<sup>20</sup> In the United Kingdom, the law specifies that exceptions to equality between men and women, based on considerations of privacy and decency, or the nature of the establishment, shall not apply to the filling of vacancies when the employer already has employees of a particular sex who are capable of carrying out the duties envisaged, who can be reasonably assigned to these tasks, and who are sufficient in number to meet the employer's likely requirements in respect of those duties without undue inconvenience.<sup>21</sup>

131. Certain provisions permit the government, following consultation with workers and employers, to identify jobs whose characteristics justify recourse to requirements based on sex, race, colour, religion or political opinion. In Spain, exceptions, reservations or preferences in recruitment which do not come under the prohibition of discrimination on several specified grounds must be laid down by legislation.<sup>22</sup> In Australia, regulations issued by the Governor-General may indicate sex as a valid criterion for a given job.<sup>23</sup> In Denmark, Ministers may determine which jobs shall be exempt from the principle of equality, based on the importance of recruiting a person of a particular sex for the performance of certain types of jobs.<sup>24</sup> In other cases, the legislature or the government may, after consulting with employers' and workers' representative

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requires the job to be held by a man because - (i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention, and (ii) those persons are all men (disregarding any woman whose presence is exceptional), and (iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a woman".

<sup>20</sup> Certain provisions go beyond the intent of the exception provided for in Article 1, paragraph 2. This is true of provisions which stipulate that a given job must be performed by a member of one sex, rather than the other, because the job will probably entail work abroad where local customs and legislation are such that the work cannot be carried out effectively by a woman. See also below para. 132, note 27.

<sup>21</sup> S. 7(4) of the above-cited Act. Although it does not use the term, this provision reflects the concept of reasonable adaptation; see below, para. 132, note 27.

<sup>22</sup> S. 17(2) of the above-cited Workers' Charter; no guidance is given for the identification of exceptions, which is left to the legislature.

<sup>23</sup> S. 30(2)(h) of the above-cited Act of 1984.

<sup>24</sup> S. 11(1) of Act No. 161 of 12 April 1978 concerning Equality between the Sexes. The competent Minister may waive the provisions against discrimination, subject to the approval of the Minister of Labour and the Equality Council. See also Norway, s. 2 of the above-cited Act No. 45 of 1978.

bodies, draw up a list of jobs for which consideration of a criterion mentioned in the Convention shall not be deemed discriminatory, owing to the nature of the job and the conditions in which it is performed. In Luxembourg the Government may, after consultation with the parties concerned, identify cases in which a particular sex may be required for a particular employment, training or occupational activity, owing to the nature or conditions of the activity in question.<sup>25</sup>

132. In a certain number of cases, an exception to the principle of equality is based on the fact that what is normally a criterion for illegal discrimination, may constitute a bona fide occupational requirement or qualification, or a reasonable occupational qualification, either for specifically designated jobs or categories of jobs, or for all employment. In general, where jobs are identified by name, there is a presumption that preferences, distinctions or exclusions applying to a job or a limited category of jobs, are a bona fide occupational requirement. Where however the notion of bona fide occupational requirements applies to all employment, the burden of proof lies with the employer. Certain national legislation defines the scope of the concept of bona fide occupational requirement or qualification:<sup>26</sup> qualifications which make it necessary to hire

<sup>25</sup> S. 3(2) of the above-cited Act of 8 December 1981 concerning equality of treatment between the sexes. See also Belgium, s. 122 of the above-cited Economic Reform Act of 4 August 1978: "The Crown may, by order made after discussion in the Council of Ministers, prescribe the cases in which reference may be made to the worker's sex in the conditions of admission to any form of employment or occupational activity in which sex is an essential condition on account of the nature of the employment or activity concerned or the conditions in which it is carried on. For this purpose the Crown shall consult the Committee on Women's Work. The Crown shall also consult the National Labour Council in cases relating to the private sector and, in cases relating to the public sector, the General Trade Union Advisory Committee or the General Committee to be set up for all the public services ... The bodies consulted shall express an opinion within two months of their being approached." France, s. L.123-1 of the Labour Code. S. 416-3 of the Criminal Code, which penalises dismissing or refusing to hire a person owing to his or her origin, customs, family status, ethnic background, national origin, race or religion, does not provide for the exception of just cause laid down in s. 416-1 (supply of goods or services); just cause may no longer be invoked as regards racial discrimination (s. 85 of Act No. 87-588 of 30 July 1987).

<sup>26</sup> See, for example, Canada: Guide-lines of the Canadian Human Rights Commission concerning the limitations and modalities for the application of subsection 14(a) of the Canadian Human Rights Act to employment (Guide-lines on Bona Fide Occupational Requirements) S1/82-3, filed on 13 January 1982; Saskatchewan, s. 1(b) of the Regulations concerning the Saskatchewan Human Rights Code; United States: Texas, s. 2.01 of the Human Rights Commission Act. See also United States, Guide-lines adopted in 1965 and subsequently amended by the Equal Opportunity Commission concerning sex as a bona fide occupational qualification, 29 CFR Part 1604.

only persons of a given sex or age bracket, or persons possessing certain physical capabilities which are required to ensure that the nature of the work in question is not affected, or that the tasks involved are carried out safely, or in connection with tasks whose performance is essential to the primary objectives of the enterprise. It is not enough that the employer believes sincerely that the candidate must meet certain conditions to be eligible for the job: there are no bona fide occupational requirements other than those which the employer is able to substantiate. These same provisions also point to a number of unacceptable requirements: the evaluation of an individual's competence for a given task based on stereotypes of the category or group to which the person belongs, rather than on his or her merit and personal competence; requirements based on the preferences of employees and clients, except as regards purposes of authenticity;<sup>27</sup> requirements stipulating that tasks should be accomplished in a particular way, when there are other reasonable ways of performing the same tasks; qualifications based on a distinction between "heavy work" and "light work", which amount to a veiled distinction between the sexes that may unfairly and unreasonably impede the promotion of women to jobs to which they would otherwise have access, etc. The various laws which make reference to the exception based on bona fide occupational requirements do not apply to all grounds for discrimination, but are generally limited to physical or mental disability, sex, religion and age. Thus, there is no exception to the principle of equality of opportunity and treatment in employment and occupation with regard to the grounds which are not

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<sup>27</sup> See the case of Imberto v. Vic and Tony Coiffure and Tony Ruscica (Ont., 2 C.H.R.R.D/392, 1981): the complainant alleged that he had not been hired in a hairstyling salon because he was a man, the employer alleged the reason to be the aversion shown by other employees and the possible objections of clients to the presence of a male in the enterprise, and argued that sex constituted a bona fide occupational requirement. The Ontario Board of Inquiry stated that the aversion of other employees did not relieve the employer of his obligations under the Human Rights Code, which sought to promote a working environment in which members of both sexes could establish normal and harmonious working relations. As regards the objections of clients, the Bureau stated that it would be completely inappropriate to admit that the preferences of clients might determine whether sexual discrimination was permissible. The preferences of clients could be taken into account only when they are based on the enterprise's inability to fulfil its principal objectives. Concerning the requirements of foreign clients as regards race or religion, see also the measures taken by the Government of the Netherlands: the 1981 amendment to s. 429 of the Criminal Code concerning cases in which workers are required to state in writing that they are "non-Jewish", and the adoption in 1984 of an Act on reporting foreign boycott measures imposed on Netherlands companies by foreign groups or enterprises, by which the Government sought to measure the extent and nature of the constraints imposed, RCE 1986, p. 273-274. See also Chapter I, Section 3, para. 22, note 77.

explicitly referred to in the legislation: such other grounds are in a general and absolute way deemed discriminatory.<sup>28</sup>

133. In Canada, the Canadian Human Rights Commission has published guide-lines concerning the interpretation of the term "bona fide occupational requirements", which are based on three main concepts: essential tasks, individual competence and reasonable accommodations.<sup>29</sup> In the first place, the enterprise may base job requirements only on the job's essential tasks. Secondly, the competence of each person who applies for the job must be assessed fairly, and the employer may not refuse to examine the applications of persons who belong to certain categories. Lastly, to the extent possible, the enterprises must be prepared to make the necessary accommodations to permit disabled persons and the adherents of certain religions to modify their work schedules, or to exchange certain non-essential duties with other employees. In order to demonstrate that the necessary adaptations are not reasonable, the enterprise may cite undue hardship, whether related to financial cost or business inconvenience.<sup>30</sup> The concept of reasonable accommodation is considered a fundamental principle of equality of access to employment, for it takes account of limitations and special needs which may lend themselves to unlawful distinctions, especially as regards religion or disability. Indeed, the unjustified refusal to undertake such adaptations may in itself constitute an act of discrimination.

Section 2. Measures affecting an individual who is suspected  
of activities prejudicial to the security of the State

134. In accordance with Article 4 of the Convention, "any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall

<sup>28</sup> See note 25 above, France, concerning an approach which leads to a similar result: legislation stipulates that racial discrimination may not constitute just cause for refusing goods or services (s. 416-1 of the Criminal Code, as amended by the Act of 30 July 1987).

<sup>29</sup> The above-mentioned Guide-lines on Bona Fide Occupational Requirements. Interim policies were laid down in 1984 concerning all criteria for discrimination, underscoring that employers should establish practices to comply with the Act. Bona fide occupational requirements or just cause may exist when the person concerned does not meet the requirements reasonably necessary for the performance of the essential tasks of a given job. The employee must be able to perform the essential tasks of a job safely, reliably and efficiently. The Commission is expected to adopt new guide-lines in the near future. See Canadian Human Rights Commission, "1985 Annual Report", p. 16.

<sup>30</sup> Concerning the concept of reasonable accommodation, see also United States: Arizona, s. 41-1461(8) of the Civil Rights Act; Montana, s. 49-2-402 of the Civil Rights Act.



not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice."<sup>31</sup> As an exceptional clause, Article 4 must be applied stricto jure in order to avoid undue limitations on the protection which the Convention seeks to guarantee. Very little information has been communicated by governments as regards the conditions and criteria of application of Article 4 of the Convention. Given the impact which the application of this Article may have on the practical implementation on the principle of equality of opportunity and treatment in employment and occupation, the Committee considers it necessary to recall certain observations it has formulated previously.

135. Firstly, measures not to be deemed discriminatory under Article 4 must be measures affecting an individual on account of activities he or she is justifiably suspected or proven to have undertaken. The Committee has previously noted that Article 4 of the Convention "excludes, first of all, any measures taken not because of individual activities but by reason of membership of a particular group or community; such measures could not be other than discriminatory."<sup>32</sup> Secondly, the exception provided for in Article 4 refers to activities qualifiable as prejudicial to the security of the State, whether such activities are proved or whether concurring and precise presumptions justify suspecting such activities.<sup>33</sup>

<sup>31</sup> This exception to the general principle was not contained in the conclusions initially proposed by the Office for the first discussion of the proposed Convention in 1957. During this discussion the Conference Committee on Discrimination adopted an amendment submitted by the Employers' members which stipulated that the Convention's provisions would not apply "to any statutory provisions or administrative regulations which relate to the national security of a Member." (ILO: Discrimination in the field of employment and occupation, ILC, 42nd Session, 1958, Report IV(1), p. 8.) However, objections were raised within the Committee, the plenary session of the Conference, and in the written replies of certain governments, to the effect that this text could lead to abuses (ibid., pp. 18-25). At the second discussion in 1958, the text was replaced by an amendment submitted by the Workers' members, which is reflected in the present text of Article 4 (ILO: Record of Proceedings, ILC, 42nd Session, 1958, pp. 403 and 712).

<sup>32</sup> General Survey, 1963, para. 47. See also Islamic Republic of Iran: RC 1987, pp. 367-370: "The dismissals, discharges and exclusions are pronounced in relation to membership of a group such as the 'misguided Baha'i group', freemasonry or atheistic organisations, without any mention of the exercise of individual activities prejudicial to the security of the State [...]. The Committee recalls that in its observations over a number of years it has noted that, in the texts available to it a distinction is made in the grounds for dismissal, discharge or exclusion between persons belonging to the groups referred to above and persons alleged to have committed acts of espionage or acts prejudicial to the security of the State."

<sup>33</sup> See General Survey, 1963, para. 47.

Therefore, the expression of opinions or religious, philosophical or political beliefs is not a sufficient base for the application of the exception justified by activities prejudicial to the security of the State.<sup>34</sup> It should be recalled that the protection afforded by the Convention is not limited to differences of opinion within the framework of established principles, and that if certain doctrines are aimed at fundamental changes in the State's institutions, this does not constitute a reason for considering their propagation beyond the protection of the Convention, provided those who may advocate such doctrines do not resort to violent methods to bring about such changes.<sup>35</sup>

136. Thirdly, measures intended to safeguard the security of the State within the meaning of Article 4 of the Convention must be sufficiently well defined and delimited to ensure that they do not become discrimination based on political opinions or religion, which

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<sup>34</sup> See Federal Republic of Germany, above-cited report of the Commission of Inquiry, paras. 574 and 579; the Government considers that measures taken in application of the duty of faithfulness to the free democratic basic order fall within the exception provided for in Article 4. In considering cases of exclusion from the public service of persons associated with the German Communist Party (DKP), the Commission of Inquiry noted that the public authorities "have referred ... for example, to criticism of the existing economic order and its description as one of 'capitalist exploitation', to the campaign against so-called 'Berufsverbote', and to the special emphasis on negative manifestations in the life of the Federal Republic without mention of its positive achievements. It would appear that what is involved here is essentially the expression of political views, not activities prejudicial to the security of the State within the meaning of Article 4 of the Convention" (ibid., para. 579). See also Chile, RCE 1982, p. 192: "The Committee therefore considers that the expression of political opinions cannot be removed from the protection laid down in the Convention by defining it as the act of propagating particular doctrines."

<sup>35</sup> See Chile, RCE 1982, p. 192; see also the report of the Committee appointed to review the claim submitted by the ICFTU, under article 24 of the Constitution, concerning Czechoslovakia's non-observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Official Bulletin, Supplement, Vol. LXI, 1978, Series A, No. 3, para. 21 concerning notifications and decisions affecting the employment of certain persons, owing to their endorsement or support of the "Charter 77 Manifesto". The Committee noted that "this Manifesto contains various criticisms concerning the policy of the Government, and it is not for the Committee to assess whether these criticisms are well-founded or inaccurate. ... It does not emerge from the information available that the signing or adhering to such a document could in itself be considered, in relation to the principle protection envisaged by the Convention on matters of political opinion ..., as an activity against the security of the State"; see also Czechoslovakia, RCE 1983, p. 211, and Turkey, RCE 1983, p. 224-225.

would defeat the Convention's primary objective, namely to promote equality of opportunity and treatment in employment and occupation.<sup>36</sup> The Committee has previously emphasised that Article 4 of the Convention "rests on the protection of the 'security of the State', the definition of which should be sufficiently narrow to avoid the risk of coming into conflict with any policy of non-discrimination. [...] while some national provisions appear at first sight to contain a sufficiently precise definition of what constitutes a threat to the security of the State, others are couched in such broad terms (covering for example lack of 'loyalty', 'the public interest', 'anti-democratic' behaviour, membership in or support of certain political movements, etc.) that in the absence of detailed information as to their application in practice it is not possible to be certain that use might not be made of them for reasons related solely to political opinion."<sup>37</sup> The application of measures intended to protect the security of the State must be examined in the light of the bearing which the activities concerned may have on the actual performance of the job, tasks or occupation of the person concerned. Otherwise, there is a danger, and even likelihood, that such measures entail distinctions and exclusions based on political opinion or religion, which would be contrary to the Convention.<sup>38</sup>

<sup>36</sup> In this connection, see the principles of interpretation applicable to the notion of "national security" in the International Covenant on Civil and Political Rights, in United Nations, Commission on Human Rights, 41st Session, E/CN.4/1985/4, Annex, p. 5: "29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force. 30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. 31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse. 32. The systematic violation of human rights undermines national security and may jeopardise international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population."

<sup>37</sup> General Survey, 1963, para. 47.

<sup>38</sup> See Chile, RCE 1982, p. 192: "The definition of 'activities prejudicial to the security of the State' must be sufficiently narrow to avoid conflict with the main protection provided for in the Convention in respect of political opinion. Article 8 of the Constitution of Chile, in providing for the exclusion of persons from certain employments by reason of their propagation of certain doctrines, appears not to observe the limits of Article 4 of the Convention." See also Czechoslovakia, RCE 1982, pp. 197-199: "The interpretation of the concept of 'endangering the security of the State' which the Employers' Section of the Czechoslovakian Chamber of

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137. In addition to these substantive conditions intended to guarantee that measures adopted in practice are not discriminatory within the meaning of the 1958 instruments, there is also a procedural guarantee: the right of the person affected by the measures described in Article 4 of the Convention, "to appeal to a competent body established in accordance with national practice." Existence of a right of appeal, while constituting a necessary condition for the application of the exception to the principle of the Convention,<sup>39</sup> is however not sufficient in itself.<sup>40</sup> Bearing on the observance of the substantive conditions mentioned in the preceding paragraphs, the right of appeal cannot be considered as a guarantee in accordance with the provisions of Article 4 of the Convention, unless those substantive conditions have been met. In a previous Survey, the Committee already stated that "enforcement through the courts will not suffice to guarantee the application of the standards embodied in the 1958 instruments in this respect if the provisions which the courts have to apply are themselves incompatible with these standards."<sup>41</sup> The reference to "a competent body established in accordance with national practice" clearly implies that a variety of systems may be used to permit the exercise of this right of appeal. Appeals may follow the

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Commerce and Industry has invited its members to adopt in applying the provisions of the Labour Code relating to dismissal on that ground corresponds to that stated by the court in one of the judgements of 1977 ... in which the mere fact of signing the 'Charter 77' Manifesto was held to justify dismissal." See also Turkey, RCE 1985, p. 294: "Legislation does not require the Martial Law Commanders to take account of the effect that the activities the civil servant is reproached with may have on the performance of the duties inherent in his office when they take decisions concerning transfer or dismissal. The Committee further notes that the Martial Law Commanders can also take measures of transfer or dismissal when 'the work is not considered necessary', a criterion irrelevant to the protection of the security of the State whose application should depend directly on the decision and responsibility of the authorities employing the civil servants."

<sup>39</sup> See, for example Islamic Republic of Iran, RCE 1987, p. 369: the Committee noted that "the provisions of the Directive of the Ministry of Labour published on 8 December 1981 stating that the courts are bound to withhold the issuance of any judgement in favour of dismissed employees whose membership in the 'misguided Baha'i group' or in organisations whose constitutions imply atheism has been ascertained and proved. A Government representative stated to the Conference Committee in 1983 that this Directive is based on legislation ratified by the Islamic Parliament." Consequently, the Committee determined that the condition of procedural guarantees laid down in Article 4 of the Convention has not been fulfilled.

<sup>40</sup> See, for example, Chile, RCE 1982, p. 192: "The fact that procedural safeguards are laid down as regards application of the constitutional provision [article 8 of the Constitution of 1980] does not suffice to ensure observance of the Convention."

<sup>41</sup> General Survey, 1971, para. 38.

normal procedural rules of judiciary or administrative courts. In certain cases, special procedures, often established under emergency legislation, are provided for the examination of measures taken. Compliance with Article 4 of the Convention must be examined on a case-by-case basis so as to ascertain that certain minimum conditions are met. There must be an appeals "body" which is separate from the administrative or governmental authority, and which offers a guarantee of objectivity and independence. This body must be "competent" to hear the reasons for the measures taken against the person in question, and to afford him or her the opportunity to present his or her case in full.<sup>42</sup>

138. In certain cases, the fact that one is suspected of activities prejudicial to the security of the State may entail the arrest and detention of the person concerned; pursuant to the provisions of labour or other legislation, this may lead to termination of the employment contract. In order to avoid this termination of employment contracts, provisions have been inserted into a collective agreement in Venezuela, with a view to protecting workers who are being detained by the police or the courts, by safeguarding their employment until their guilt has been established by a final judgement.<sup>43</sup> If suspicions concerning a person alleged to have engaged in activities prejudicial to the security of the State are not confirmed during the course of the required procedures, the restrictions to the principle of equality of opportunity and treatment in employment and occupation

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<sup>42</sup> See, for example, the report of the Commission of Inquiry appointed under article 26 of the Constitution to examine the observance of the Hours of Work (Industry) Convention, 1919 (No. 1), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by Chile, GB.196/4/10, paras. 174 and 175: "... the special commissions and tribunals established for the examination of appeals against dismissals did not correspond, in their composition, with what might be considered 'a competent body established in accordance with national practice' ... The special commissions for the public sector were not governed by clear provisions enabling them to examine the substance of the case. They did not provide sufficient guarantees for the adequate consideration of exonerating factors, nor did they facilitate the presentation of evidence by the appellants. As a result, this procedure did not provide the guarantees which should normally exist to prevent, or to obtain the reversal of, dismissals based on political opinion rather than on activities which were in fact prejudicial to the security of the State or on other legitimate grounds for dismissal. ... The Commission has reached the conclusion that the special forms of appeal instituted by the Government for persons dismissed for reasons relating to the security of the State were not in conformity with the requirements of Article 4 of the Convention as regards individuals who were justifiably suspected of, or engaged in, activities prejudicial to the security of the State." The special measures in question were repealed by the Government after the complaint was filed.

<sup>43</sup> First collective agreement of workers in the teaching profession, dated 9 April 1984, para. 46 - Detention pending trial.

must be lifted as regards the person concerned. The Canadian Human Rights Commission has proposed an amendment to the Canadian Human Rights Act which would institute an appeal to ensure that persons who have come under indictment do not incur discrimination because of a charge of a criminal offence regarding which they have not been convicted.<sup>44</sup>

### Section 3. Special measures of protection or assistance

139. There are two kinds of special measures of protection or assistance envisaged in Article 5 of the Convention: measures of protection and assistance provided for in international labour Conventions and Recommendations, and measures taken after consultation with employers' and workers' organisations which are designed to meet the particular requirements of persons or groups of persons who require special protection or assistance.

#### Subsection 1. Measures provided for in international labour standards

140. Ratification of Convention No. 111 is not to come into conflict with the ratification or implementation of other instruments adopted by the International Labour Conference providing for special measures of protection or assistance. Under Article 5 of the Convention, distinctions or preferences which may result from the application of such measures shall not be deemed to be discrimination within the meaning of the Convention. This concerns, for instance, special measures which may be taken on behalf of indigenous populations or disabled or older persons, which are expressly recognised as non-discriminatory.<sup>45</sup> It concerns also provisions intended to protect maternity or the health of women, which are contained in numerous international instruments of the ILO.<sup>46</sup>

<sup>44</sup> Canadian Human Rights Commission: 1985 Annual Report, p. 10.

<sup>45</sup> See, for example, the provisions of Article 3 of the Indigenous and Tribal Populations Convention, 1957 (No. 107); those of Article 4 of the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) which envisage "special positive measures aimed at effective equality of opportunity and treatment", and those of paragraph 10 of the Older Workers Recommendation, 1980 (No. 162).

<sup>46</sup> Maternity protection: Maternity Protection Convention, 1919 (No. 3); Maternity Protection Convention (Revised), 1952 (No. 103); Maternity Protection Recommendation, 1952 (No. 95); Plantations Convention, 1958 (No. 110), Part VII; dangerous or unhealthy work: Maximum Weight Convention, 1967 (No. 127); Radiation Protection Recommendation, 1960 (No. 114); White Lead (Painting) Convention, 1921 (No. 13); Benzene Recommendation, 1971 (No. 144); Underground Work (Women) Convention, 1935 (No. 45); night work: Night Work (Women) Convention, 1919 (No. 4); Night Work (Women) Convention (Revised), 1934 (No. 41); and Night Work (Women) Convention (Revised), 1948 (No. 89).

141. In the light of available information, the question of the relationship between the prohibition of night work for women and the principle of equality and opportunity of treatment in employment and occupation has been examined. The International Labour Conference has adopted three Conventions on night work of women in industry,<sup>47</sup> and many States have dealt with the matter in statutory instruments.<sup>48</sup> In most cases the rules prohibiting the employment of women at night provide for exceptions which permit the employment of women at night in the fields of health care (hospitals), hotels, restaurants, entertainment and amusements, and in commerce and offices. Moreover, these rules do not generally apply to women holding responsible managerial or technical posts. Since its most recent General Survey, the ILO has recorded nine denunciations of one or the other of the instruments prohibiting night work for women, including four by States which have ratified Convention No. 111: Chile, Hungary, Netherlands and New Zealand.<sup>49</sup> In support of their denunciations, the Governments indicated that improvements in working conditions and changes in attitudes had eliminated the objective reasons which had originally motivated this protection, and that the ban on night work for women had come to be perceived as an inadmissible form of discrimination.<sup>50</sup> Certain governments have also stated that these Conventions weaken the position of women on the labour market by

<sup>47</sup> Night Work (Women) Convention, 1919 (No. 4), revised in 1934 by Convention No. 41; and again in 1948 by Convention No. 89 which, as of 23 March 1988, had been ratified by 62 States.

<sup>48</sup> See ILO, Women Workers - Protection or Equality? Conditions of Work Digest, Vol. 6, 2/87, pp. 13-54.

<sup>49</sup> Chile, Night Work (Women) Convention, 1919 (No. 4), Official Bulletin, Vol. LIX, Series A, 1976, p. 149; Hungary, Night Work (Women) Convention (Revised), 1934 (No. 41), Official Bulletin, Vol. LXI, Series A, 1978, p. 29; Ireland, Night Work (Women) Convention (Revised), 1948 (No. 89), Official Bulletin, Vol. LXV, Series A, 1982, p. 32; Luxembourg, Night Work (Women) Convention, 1919 (No. 4) and Night Work (Women) Convention (Revised), 1948 (No. 89), Official Bulletin, Vol. LXV, Series A, 1982, p. 32; New Zealand, Night Work (Women) Convention (Revised), 1948 (No. 89), Official Bulletin, Vol. LXV, Series A, 1982, p. 32; Netherlands, Night Work (Women) Convention (Revised), 1948 (No. 89), Official Bulletin, Vol. LV, No. 1, 1973, p. 19; Sri Lanka, Night Work (Women) Convention (Revised), 1948 (No. 89), Official Bulletin, Vol. LXV, Series A, 1982, p. 32; Uruguay, Night Work (Women) Convention (Revised), 1948 (No. 89), Official Bulletin, Vol. LXV, Series A, 1982, p. 32.

<sup>50</sup> See, for example, Hungary: "A proportion of women consider their exclusion from night work by reason only of their sex to be discriminatory", *idem*; Ireland: "Changes have occurred in circumstances since the adoption of the Convention which render the prohibition of the employment at night of women an inadmissible discrimination against women workers", *idem*; Uruguay: "The intention declared in the past of protecting women against arduous or dangerous work today constitutes a factor of discrimination restricting the opportunities of access to employment", *idem*.



diminishing demand for their services.<sup>51</sup> Several countries have been debating in recent years the advisability of denouncing these Conventions.<sup>52</sup> It has been argued that repeal of the prohibition would be considered as a means of enhancing productivity and of removing obstacles to equality of opportunity and treatment.<sup>53</sup> The Governing Body of the ILO has decided to include the question of night work on the agenda of the 76th Session of the International Labour Conference (1989).<sup>54</sup>

142. From the standpoint of Convention No. 111, eliminating the protection afforded to women by the ban on night work in industrial enterprises cannot be deemed the only measure necessary in order to promote equality of opportunity and treatment in employment and occupation. Other measures, such as a generalised prohibition of this form of work, considered intrinsically harmful to the health and life of all workers,<sup>55</sup> whether men or women, accompanied by strict limitations established in consultation with employers' and workers' organisations in respect of night work indispensable to ensure essential services or imposed for technical reasons will satisfy the requirements of the promotion of equality. Rules adopted in application of the principles established in international Conventions concerning the night work of women in industry come under the provisions contained in Article 5, paragraph 1, of the Convention. The Committee is of the opinion that the promotion of equality of opportunity and treatment in employment and occupation, without discrimination based on sex, should not be sought at the expense of a degradation of working conditions, and much less be based on such a

<sup>51</sup> See Luxembourg: "These two Conventions in the industrial world of today [are] an obstacle to the access of women to numerous occupations", *idem*; Sri Lanka: "In view of the fact that a third shift for women workers has to be introduced almost immediately if this country is to attract foreign investors for electronic and allied industries into the Investment Promotion Zones ...", *idem*.

<sup>52</sup> See ILO, *Women Workers - Protection or Equality? Conditions of Work Digest*, Vol. 6, 2/87, pp. 127-180.

<sup>53</sup> See, for example, France: "Act No. 87-423 of 19 June 1987 [LS 1987-Fr. 1], is designed to promote the organisation of working time, and thereby to enhance productivity and enable the enterprise to adapt to the constraints of its environment. Current regulations on night work for women have discriminatory side-effects (for instance, in plants in which the profitability of new equipment is to benefit from the introduction of continuous shift work, the exclusion of women from shift work diminishes their prospects for promotion). This has prompted the adoption of legislation which would authorise enterprises using shift work to employ women workers at night." Circular of 30 June 1987 on the application of the provisions of Act No. 87-423 of 19 June 1987 concerning the duration and arrangement of working hours.

<sup>54</sup> This agenda item includes: (a) the partial revision of Convention No. 89 by means of a protocol; and (b) the formulation of new standards on night work in general - GB.238/2/1, para. 105.

<sup>55</sup> See J. Carpentier and P. Cazamian, *Night work. Its effects on the health and welfare of the worker*, ILO, Geneva, 1978.

degradation.<sup>56</sup> The International Labour Conference recalled that the "protection of women at work shall be an integral part of the efforts aimed at continuous promotion and improvement of living and working conditions of all employees".<sup>57</sup> Equality of opportunity and treatment has been widely invoked with a view to legitimising efforts to eliminate the ban on night work for women, to the point of losing sight of other economic and social considerations which may exercise a certain influence in this area.<sup>58</sup> In examining this question, the Commission of the European Communities considered that "discussion of the problem should no longer concern whether a job should be done by men or women, but rather the legitimacy and necessity of night work at all".<sup>59</sup>

143. Maternity protection, in the form of leave before and after confinement and protection against dismissal,<sup>60</sup> is in certain countries a standing and usual requirement offering varying degrees of

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<sup>56</sup> For example, the laws in several countries prohibit the equalisation of wages by reference to the lowest wage: Canada, s. 11.5 of the Canadian Human Rights Act; United States, s. 206(d) of the 1963 Equal Pay Act, see LS 1966-USA 1 (Fair Labor Standards Act); India, s. 4(2) of the 1976 Equal Pay Act; Swaziland, s. 96(4) of the 1980 Employment Act.

<sup>57</sup> ILC, 60th Session, 1975, Declaration on Equality of Opportunity and Treatment for Women Workers, Art. 9, Official Bulletin, Vol. LVIII, 1975, Series A, pp. 96-100.

<sup>58</sup> See the statement made by the Workers' member of Switzerland to the Conference Committee on the Application of Conventions and Recommendations: "Most measures for the special protection of women were not discriminatory but often represented the most advanced stage in the protection of workers in general ... the point at issue was not the campaign against discrimination against women but the economic recovery of certain enterprises. The idea was to transfer out of normal working hours relatively unskilled work for which employers wished to take on poorly paid workers - in other words, women. ... [T]he revision of Convention No. 89 should aim to fill the gaps in that instrument and to stop night work for both men and women", ILC, 72nd Session, 1986, Report of the Committee on the Application of Conventions and Recommendations, Part 1, para. 65.

<sup>59</sup> Commission of the European Communities, Protective Legislation for Women in the Member States of the European Community, COM(87) 105 final, Brussels, 1987, p. 12. The Commission submitted to members several observations by order of priority: a ban on night work for all workers, coupled with equal derogations for both sexes, with the exception of pregnant or nursing mothers; if this is not possible, a lifting of the ban for women in the context of a general improvement in working conditions; if this is impossible, "the result should neither be a perpetuation of the ban nor a worsening of women's working conditions".

<sup>60</sup> The Maternity Protection Convention, 1919 (No. 3), and the Maternity Protection Convention (Revised), 1952 (No. 103) had received 28 and 25 ratifications, respectively, as of 23 March 1988.

protection, depending upon the country in question.<sup>61</sup> In practice, however, maternity remains subject to discrimination when it is taken into account in considering applications for employment or as grounds for termination.<sup>62</sup> It is also the source of indirect discrimination as regards working conditions. In a number of countries measures for the protection of maternity are considered as an exception or dispensation from the principle of equality. Maternity, however, is a condition which requires differential treatment to achieve genuine equality, and in this sense, it is more of a premise of the principle of equality than a dispensation. Measures of protection for maternity aim to protect the maternal function, rather than the woman herself, even if the two go hand in hand for biological reasons.<sup>63</sup> The question of maternity protection goes beyond the sphere of protective legislation, "being related to national social factors, since it concern[s] a right and a function affecting the future of the entire community. It [is] considered necessary that special measures should be taken to enable women to fulfil their maternal role."<sup>64</sup> Available information shows that in many countries very special consideration is accorded to maternity and pregnancy protection, and that often quite comprehensive measures have been adopted which in some cases go beyond the protection afforded by international Conventions.<sup>65</sup>

<sup>61</sup> See ILO, Maternity Leaves and Cash Benefits, Conditions of Work: A Cumulative Digest, 1982, pp. 1-58.

<sup>62</sup> See above, Chapter I, Section 3, para. 25.

<sup>63</sup> See Mexico, s. 165 of the Federal Labour Act. In its report, the Government states that the provision concerning maternity protection is designed to protect the mother, rather than the woman. Yugoslavia: the Government states in its report that specific measures for the protection of women at work are related to the biological reproductive function of women, and express society's high regard for birth as an integral part of social renewal.

<sup>64</sup> ILO, Meeting of Experts on Equality of Remuneration, Geneva, 1974, MEER/1/1974/3, paras. 14 and 44.

<sup>65</sup> See, for example, Mexico, s. 166 of the Federal Labour Act. Poland: in its report, the Government states that equality between men and women is guaranteed by a system which seeks to protect the health of mothers and children, to provide pregnancy protection and paid leave before and after confinement, and to develop a network of maternity clinics, nurseries and day-care centres. In the USSR, women who must take leave of their jobs owing to pregnancy continue receiving the average wages they had earned while working (s. 164 of the Labour Code). Pursuant to s. 170 of the Labour Code, employers may not refuse to hire women or reduce their wages owing to the fact that they are pregnant or nursing a child. The dismissal of pregnant women, of nursing mothers and of women who have children of under one year of age is authorised only in the event of the total liquidation of the enterprise; in such cases, the employer is required to find new employment for dismissed mothers. These provisions were mentioned in Decision No. 6 of the plenary session of the Supreme Court of the

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144. A certain number of measures are undeniably related to what many countries<sup>66</sup> consider as a legitimate need to protect women against the biological risks which they face as women. It will be necessary to maintain this protection until manufacturing processes have been modified so as to eliminate all biological risks which may affect women (or their unborn children), or until protective equipment which assures the same results is available, or until subsequent research has shown that initial fears were unwarranted.<sup>67</sup> Certain countries have stated that maternity protection measures should be maintained and reinforced to comply fully with Convention No. 111, and to conform with the spirit of the revision of protective legislation.<sup>68</sup> The Committee has had occasion to remind States that

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RSFSR concerning the application by the courts of RSFSR labour standards concerning the work of women, adopted on 17 September 1975 (Bulletin of the Supreme Court of the RSFSR, Dec. 1975). This decision was preceded by an examination of the practice of the courts, and has helped to resolve certain problems arising in connection with the application of this legislation. The plenary session of the Supreme Court of the RSFSR also declared that a female employee's refusal to carry out an order which is contrary to ss. 162 and 163 is justified and does not constitute a breach of discipline at work. The Supreme Court further specified that these sections apply to all women, whether wage earners or employees, regardless of the nature of their work. Yugoslavia: pursuant to s. 189 of the Associated Labour Act, "workers in basic organisations shall have the right and duty, in conformity with the self-management agreement ... to ensure ... special protection of pregnant women from heavy work, overtime and night work, maternity leave, shorter working time after confinement ... and other rights ensuring protection of maternity." Similar measures are provided for in the laws of the various republics.

<sup>66</sup> See, for example, an analysis of the position of Nordic countries on this question in R. Nielsen, Special protective legislation for women in the Nordic countries, International Labour Review, Vol. 119, No. 1, pp. 39-49: "The prevailing view in the Nordic countries is that neither men nor women workers should be protected on the grounds of sex, except for strictly biological reasons. The persistence of traditional sex roles/stereotypes is not regarded as a justification for giving women special protection." *ibid.*, p. 48.

<sup>67</sup> See International Labour Conference, Resolution on equal opportunities and equal treatment for men and women in employment (Conclusions, points 7 and 8), 71st Session, 1985, Official Bulletin, Vol. LXVIII, 1985, Series A, pp. 85-95.

<sup>68</sup> "Protective legislation for women should be revised in the light of current conditions with a view to eliminating the discrimination which arises from this legislation, while maintaining maternity protection and redefining this protection within the context of the couple, by providing, for example, for parental leave." Report on the Tripartite Latin American Seminar on non-discriminatory practices in employment, Lima, 10-14 Oct. 1983.

the revision of protective legislation does not call into question the provisions concerning maternity protection.

145. Certain advantages currently afforded to women to raise children or to care for them should increasingly be granted to men as well, in accordance with the spirit of the Workers with Family Responsibilities Convention, 1981 (No. 156). Certain reports state that measures which used to apply exclusively to women have been extended to men, in keeping with protective measures adopted in view of family responsibilities.<sup>69</sup> Beyond the impact which this may have on attitudes as regards stereotypes of the respective roles of men and women as regards family responsibilities, the fact that these advantages are no longer exclusive to women would tend to make women more competitive on the labour market, for they would cease to be seen by employers as more costly than men.

Subsection 2. Measures designed to meet the particular requirements of certain categories of persons

146. Article 5, paragraph 2, of the Convention states that "any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination". Paragraph 6 of the Recommendation provides that the application of the policy on non-discrimination should not adversely affect the special measures concerned. These provisions arise, in the first place, from the wish to avoid conflicts between special measures of protection and other measures adopted with a view to eliminating discrimination within the framework of general policy. In the second place, these special measures tend to ensure equality of opportunity and treatment in practice, taking into account the diversity of situations of certain categories of persons, so as to halt the discrimination practised in their regard. These types of preferential treatment are thus designed to re-establish a balance, and are part of a broader effort to eliminate all inequalities.<sup>70</sup> Available information

<sup>69</sup> For example, Yugoslavia: The Government states in its report that the legislation of the Socialist Republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia, and the Autonomous Socialist Province of Vojvodina, allow parents to decide which of the two will exercise the right to parental leave.

<sup>70</sup> In certain countries the terms "positive discrimination" or "reverse discrimination" have been, and are still used, to describe preferential treatment. It would seem, however, that they lend themselves to confusion, to the extent that it is not really a question of granting to these categories of persons more favourable treatment, but of providing them with conditions of employment equal to those enjoyed by other workers. Concerning these questions, see Chapter IV, Section 1, paras. 166-169.

suggests that the difference between special measures of protection and assistance, and affirmative measures of preferential treatment, is often tenuous, and that whatever distinctions are established are in many cases quite artificial.<sup>71</sup>

147. In a previous Survey<sup>72</sup> the Committee emphasised the importance, in applying the Convention and in implementing a policy to promote equality of opportunity and treatment, of ensuring that special measures are justified by the aim of protection and assistance which they are to pursue. These measures must be proportional to the nature and scope of the protection needed or of the pre-existent discrimination.<sup>73</sup> Prior consultation with employers' and workers' organisations constitutes a significant guarantee that measures which are defined as non-discriminatory are consistent with the objectives of the Convention. The Committee has recalled that measures taken in application of Article 5, paragraph 2, of the Convention, should be re-examined periodically, in order to ascertain whether they are still needed. A careful re-examination of certain measures may reveal that with the passing of time, with changes in production techniques and new attitudes, these measures may be found to establish or permit distinctions, exclusions or preferences falling under Article 1 of the Convention. Article 5, paragraph 2, also gives examples of valid grounds for adopting special measures of protection and assistance: sex, age, disability, family responsibilities and social or cultural level.<sup>74</sup> There are other reasons which may justify the adoption of special measures of protection and assistance; for example, certain governments have mentioned in their reports the need for special measures of assistance on behalf of foreigners and their families.<sup>75</sup>

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<sup>71</sup> See, for example, the relevant legislation adopted by certain countries; Greece: pursuant to s. 10(2) of Act No. 1414/84, measures taken in favour of one sex, to the exclusion of the other, which are intended to correct inequalities and re-establish equality of opportunity, are not considered discrimination. These measures include vocational training programmes, the promotion of employment in sectors in which workers of a given sex are under-represented, and special measures on behalf of persons who have exceptional family responsibilities; Iceland: pursuant to s. 3 of Act No. 65 of 1985 concerning equal status and equal rights between men and women, specific interim measures adopted to promote the status of women and establish equality of rights are not contrary to law.

<sup>72</sup> General Survey, 1963, para. 52.

<sup>73</sup> See the ILO memorandum sent to the Minister of External Affairs of the Federation of Malaya, Official Bulletin, Vol. XLII, No. 7, 1959, p. 397. The State's decision to adopt special measures to ensure protection and assistance for specific categories of persons "would have to be made in good faith and would have to be reasonable, having regard to conditions actually obtaining in the country".

<sup>74</sup> See above, Chapter I, Section 3, para. 65.

<sup>75</sup> See, for example, Federal Republic of Germany, Netherlands, Sweden.

Measures adopted on the basis of sex

148. Subject to the above-mentioned reservations,<sup>76</sup> a distinction may be drawn, among the various measures adopted on behalf of women, between special measures, properly speaking, which are intended to protect maternity, or health, on the one hand, and on the other hand, measures more closely related to the concept of preferential treatment, which have been adopted by States with a view to remedying the effects of discrimination exercised against women. The latter concern different levels of needs: training, access to employment and conditions of work.

149. Most States have enacted protective legislation applicable only to women, concerning either the prohibition of their employment in certain fields, or the establishment of special conditions of work. The first category includes provisions prohibiting underground work,<sup>77</sup> night work and certain kinds of hazardous and unhealthy work. The second category includes provisions which establish different conditions of work for women.<sup>78</sup>

150. Certain protective measures aim at enhancing the prospects and conditions of occupational re-entry of women whose employment has been interrupted owing to maternity and child-rearing responsibilities. In the Federal Republic of Germany, the maximum age set for admission to internships and training programmes in the public service has, in some cases, been raised for women who have had children. Women are also allowed to leave their employment for a period of up to five years for the purpose of raising a child, without losing their seniority and right to promotion.<sup>79</sup> Other measures give women priority as regards re-entry following dismissals due to the reorganisation of the service or enterprise. In the Netherlands, women enjoy priority in reassignments to other services, when the reorganisation of the public service results in dismissals.<sup>80</sup> According to available information, systems which impose quotas as regards the recruitment of women do not seem to be very widespread, even in countries that have developed extensive policies to promote the employment of women.<sup>81</sup>

<sup>76</sup> See above, para. 146.

<sup>77</sup> Underground Work (Women) Convention, 1935 (No. 45), which had been ratified by 88 countries as of 23 March 1988.

<sup>78</sup> See, for example, the provisions establishing different hours of work for women: in Peru, the hours of work are 45 hours for women and 48 hours for men; in El Salvador, 40 and 44 hours, respectively. In its report, the Government of Bolivia states that different hours of work for women and men, which are 40 and 48 hours respectively, may in certain cases be prejudicial to the recruitment of women, especially in the manufacturing sector.

<sup>79</sup> Act of 26 April 1985.

<sup>80</sup> Decree of 30 June 1987 amending the public service regulations, as regards the situation of women upon dismissal.

<sup>81</sup> In Canada, the federal Court of Appeals overturned an Ordinance of the Human Rights Court which had ordered Canada's  
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## Measures adopted for older persons

151. The most common of protective measures for this category of persons seems to be that of providing wage subsidies to enterprises with a view to promoting the hiring of older workers. In Spain, a number of incentives are offered to enterprises that recruit workers over the age of 45. For each such worker that the enterprise hires, it receives a subsidy, a two-year 50 per cent reduction of social security contributions in respect of that worker, and free vocational training for that worker.<sup>82</sup> In France, a special one-time bonus was offered to enterprises in 1979 to promote the hiring of managers over the age of 50.<sup>83</sup> In the Federal Republic of Germany, subsidies or loans may be made available to enterprises to help defray the cost of wages of older workers in order to promote the hiring of workers over the age of 45.<sup>84</sup>

152. In certain countries a quota system imposes an obligation to recruit a certain percentage of older workers among new hires. This is the case in Japan, where since 1976 the Minister of Labour, in view of current needs, may require public enterprises to raise the percentage of workers aged 55 to 65 to 6 per cent of their staff.<sup>85</sup> In Colombia all enterprises employing more than ten workers are required to employ Colombian citizens over the age of 40 in a proportion which may not be less than 10 per cent of unskilled workers, and 20 per cent of skilled workers.<sup>86</sup>

## Measures adopted for disabled persons

153. Reference has already been made in this Survey to the close relationship between the concept of protection and that of equality of opportunity.<sup>87</sup> Within the context of Article 5, paragraph 2, of Convention No. 111, and Article 4 of the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), protective measures taken by the State are intended to offer to disabled persons greater access to employment and promote their social integration. Legislative provisions which expressly prohibit discrimination based on physical or mental disability are often contained in general legislation,<sup>88</sup> occasionally in Constitutions,<sup>89</sup> and more rarely,

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national railway company to set up a special programme which would award one of every four blue-collar posts to a woman, until such time as women accounted for 13 per cent of blue-collar workers in the St. Lawrence region.

<sup>82</sup> Royal Decree No. 32-39 of 28 Dec. 1983.

<sup>83</sup> Decree No. 79-169 of 1979.

<sup>84</sup> Act of 25 June 1969 to promote employment, LS 1969-Ger.F.R. 1.

<sup>85</sup> Ordinance No. 24 of 8 Sept. 1976.

<sup>86</sup> Act No. 15 of 14 Nov. 1958, LS 1960-Col. 1.

<sup>87</sup> See above, paras. 146 and 147.

<sup>88</sup> Canada, s. 15 of the Canadian Charter of Rights and Freedoms.

<sup>89</sup> Brazil, Constitutional Amendment No. 12 of 19 Oct. 1978.

in collective agreements.<sup>90</sup> Certain legislative provisions define a general policy of occupational integration as regards disabled persons, and require regulations for their implementation.<sup>91</sup> The number of countries that have adopted specific legislation concerning the employment of disabled persons continues to grow.<sup>92</sup> Whether these provisions are contained in general labour legislation or in special legislation concerning the employment of disabled persons, virtually all contain special protective measures in favour of these workers.

154. In certain cases these provisions expressly call for co-operation between employers' and workers' organisations with a view to promoting the equality of opportunity of disabled workers.<sup>93</sup> In other cases this co-operation focuses on the placement of disabled workers.<sup>94</sup> In general, the categories covered by these laws include workers whose disability is the result of an occupational injury or disease, as well as persons whose physical capacity has been impaired for reasons extraneous to work, and in certain cases, disabled veterans of war.<sup>95</sup> Certain types of preferential treatment for disabled workers are aimed at protecting specifically those who have lost a degree of their productive capacity owing to occupational injuries or diseases.<sup>96</sup>

<sup>90</sup> Belgium, Collective Labour Agreement signed on 6 Dec. 1982.

<sup>91</sup> Algeria, s. 47 of the 1978 Act to make general provisions for workers' conditions of employment. The above-mentioned Act No. 78-12 of 5 Aug. 1978 provides that handicapped persons who cannot be employed in normal working conditions shall be entitled to sheltered work or, where necessary, places in sheltered workshops, and to special training subject to such conditions as may be prescribed by decree. Uruguay: Act No. 14312 of 10 Dec. 1974, which established the National Employment Service, LS 1974-Ur. 1, provides that specific regulations may supplement the protection available to disabled persons who have received rehabilitation benefits.

<sup>92</sup> Angola, Australia (Victoria), Austria, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Spain, Tunisia, United States.

<sup>93</sup> Netherlands, Act of 16 May 1986 concerning the employment of disabled workers.

<sup>94</sup> Guatemala, Ministerial Decision No. 12 of 29 June 1983, which created a placement division for disabled persons within the National Employment and Vocational Training Office of the Ministry of Labour.

<sup>95</sup> Angola, Decree No. 21 of 22 Apr. 1982, LS 1982-Ang. 1, concerning the adoption of measures for the protection of physically disabled persons. This Decree establishes an order of priority for the placement of disabled persons, beginning with disabled war veterans; Luxembourg, Act of 28 Apr. 1959 concerning the creation of the Placement and Occupational Rehabilitation Office for Disabled Workers.

<sup>96</sup> Bulgaria: pursuant to s. 315 of the Labour Code, the enterprise is required to reserve for these workers a number of suitable posts which varies between 3 and 10 per cent of the staff, (footnote continued on next page)

155. The measures most frequently undertaken to promote the employment of disabled workers take the form subsidies to enterprises that hire these workers; they also include tax breaks and exemptions from contributions to social security schemes.<sup>97</sup> The most widespread measure for special protection on behalf of disabled workers requires employers to hire a certain percentage of disabled workers. In certain countries, the statutory percentage is 2 per cent, calculated on the basis of all full-time workers in enterprises with more than 50 employees.<sup>98</sup> In Bahrain, the

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depending on the sector of the economy; Spain: Royal Decree No. 1451 of 11 May 1983 defines measures in application of Act No. 13 of 7 Apr. 1982 concerning the social integration of disabled persons. These measures define conditions for the re-entry of workers suffering from a partial and permanent disability. Where the disability does not affect their performance, these workers may be reinstated to their former posts. Where performance is diminished, their wages may be reduced proportionately, but in no event by more than 25 per cent. Workers who fully or partially regain their capacity to work after a period of complete disability enjoy absolute priority for hiring in the last enterprise in which they worked. Enterprises which proceed to reinstate such workers are entitled to a 50 per cent reduction of social security contributions in respect of these workers for a period of two years; Tunisia: pursuant to s. 15 of Act No. 81-46 of 28 May 1981 (LS 1981-Tun. 2), concerning the promotion and protection of disabled persons, all workers who become disabled for any reason must be reinstated by the employer following rehabilitation, if any, if there is a vacancy that can be offered to them.

<sup>97</sup> In Peru, enterprises or establishments in the public and private sectors that hire disabled workers enjoy a tax deduction of 50 per cent with respect to such workers (Act No. 23285 of 15 Oct. 1981). In Spain, pursuant to Royal Decree No. 1451 of 11 May 1983, enterprises hiring disabled workers on a permanent and full-time basis are granted a subsidy of 500,000 pesetas for each such employment contract, as well as reductions in their contributions to social security, as established in the Decree. In Sweden, wage subsidies are granted to employers who engage jobseekers who would not otherwise be able to find work on the normal employment market owing to their reduced capacity for work (Ordinance of 29 May 1980 concerning employment for which wage subsidies are payable, LS 1980-Swe. 1).

<sup>98</sup> Angola, s. 2 of Decree No. 21 of 22 Apr. 1982 concerning the adoption of measures for the protection of physically disabled persons, LS 1982-Ang. 1; Saudi Arabia, s. 54 of the Labour Code, LS 1969-Sau.Ar. 1; Spain, Royal Decree No. 1451 of 11 May 1983 instituting measures in application of Act No. 13 of 7 Apr. 1982 concerning the social integration of disabled persons; Italy, Act No. 1539 of 5 Oct. 1962, containing provisions in favour of injured and disabled civilians, LS 1962-It. 2; Luxembourg, Act of 28 Apr. 1959 concerning the creation of the Placement and Vocational Rehabilitation Office for Disabled Workers.

requirement of 2 per cent applies to enterprises employing more than 100 workers,<sup>99</sup> while in Ghana, it is 0.5 per cent of the total labour force.<sup>100</sup> In Japan, the quota for (physically or mentally) disabled persons has been raised to 2 per cent of the posts in the administration, 1.9 per cent of the posts in public enterprises and 1.6 per cent of posts in private enterprises since the legislative amendments of 1987.<sup>101</sup> In India, the Government states in its report that since November 1977, 3 per cent of central government services' posts filled by direct recruitment are reserved to disabled workers. In France, legislation on the employment of disabled persons in effect since 1 January 1988 requires that 6 per cent of workers in enterprises employing 20 or more wage earners be disabled workers; this obligation applies also in the public sector. Employers may also comply with this obligation by paying annual contributions to the Fund to Promote the Occupational Integration of Disabled Workers, for each of the posts which they are required to fill. The amount of this annual contribution, which is determined in accordance with the size of the enterprise, is limited to 500 times the minimum hourly wage.<sup>102</sup> In the Federal Republic of Germany, public and private employers with 16 or more posts are required to employ disabled workers in at least 6 per cent of such posts, including employees engaged in vocational training; the mandatory percentage for employers in the public sector may be set at a higher level than that set for employers in the private sector without, however, exceeding 10 per cent.<sup>103</sup>

#### Measures adopted for ethnic minorities and other social groups

156. Protective measures adopted on behalf of ethnic minorities and other social groups assume a variety of forms; they are designed to guarantee to indigenous and tribal populations an especially favourable treatment as regards access to employment in the public or private sector, as well as access to educational facilities, and often take the form of quotas. In other cases, special training and employment programmes are provided for these minorities, without fixed quotas, in order to enhance generally their prospects on the labour market. Previous studies have shown that India attaches a special importance to preferential policies on behalf of certain castes and

<sup>99</sup> S. 21 of Royal Decree No. 23 of 16 June 1976 promulgating the Labour Act in the private sector, LS 1976-Bah. 1.

<sup>100</sup> Act No. 632 of 15 Sept. 1969, LS 1969-Ghana 1C.

<sup>101</sup> Act No. 123 of 25 July 1960 to promote the employment of physically handicapped persons, as amended by Act No. 41 of 1 June 1987; and Cabinet Order No. 292 of 1 Dec. 1960, as amended by Cabinet Order No. 285, in force since 1 April 1988.

<sup>102</sup> Act No. 87-517 of 10 July 1987 concerning the employment of disabled workers, LS 1987-Fr. 2.

<sup>103</sup> Notification of 26 Aug. 1986 promulgating the consolidated text of the Severely Handicapped Persons Act, LS 1986-Ger.F.R. 1.

tribes and other "disadvantaged groups".<sup>104</sup> Affirmative action on behalf of disadvantaged minorities and tribal groups, in particular, is provided for in the Constitution. Article 16(4) of the Indian Constitution forbids discrimination in public employment, with the exception that state Governments may adopt provisions which reserve a number of appointments or posts to members of any "backward class" of citizens. Under article 46 of the Constitution, states are required to attach particular importance to the protection of the educational and economic interests of the more disadvantaged categories of their population, especially as regards certain castes and tribes. Such action may take the form of quotas, whether in the public sector or in educational institutions, and especially in higher education and in vocational training schools. The central Government, for its part, has since 1943 reserved a certain number of posts in official services to members of specific castes, and since 1950, to members of specific tribes. Since 1970, 15 per cent of posts filled by national public competitions are reserved to members of specific castes, and 7.5 per cent to members of specific tribes. As regards posts in lower grades, which are generally filled through local recruitment, the percentages are established as a function of the size of these populations in the area under consideration. The central Government's example has been followed at the state level. In some states where the percentage of the tribal population is relatively high, the percentage of public service posts reserved to members of tribal populations may reach up to 80 per cent,<sup>105</sup> but in states where these populations are smaller, the percentage of reserved posts may be as low as 3 per cent.<sup>106</sup> In Pakistan, in the FATAs (Federally Administered Tribal Areas), 4 per cent of posts in federal government services are reserved to tribal populations. The North West Frontier Province and the PATAs (Provincially Administered Tribal Areas) have been divided into five recruiting sectors, with each sector being allocated four posts out of 21 vacancies of all types for members of a tribal population.<sup>107</sup> The Government has stated that employment in new enterprises created in the FATAs is reserved exclusively to tribal members, except where these persons do not have the necessary occupational skills; in this case, the enterprises may be required to provide vocational training. Descriptions of various measures on

<sup>104</sup> General Survey, 1963, paras. 50 et seq. and notes, and General Survey, 1971, para. 56 and notes.

<sup>105</sup> India, Arunachal Pradesh; in other states or territories the percentage of reserved posts are the following: 45 per cent in Mizoram, 31 per cent in Manipur, 29 per cent in Tripura, etc.

<sup>106</sup> A detailed study of these preferential policies and their application in India may be found in Marc Galanter, Competing equalities: Law and the backward classes in India, University of California Press, 1984; see also Myron Weiner and Mary Fainsod Katzenstein, India's preferential policies, University of Chicago Press, 1981.

<sup>107</sup> CERD/D/149/Add. 12, 17 Aug. 1986.

behalf of ethnic minorities are contained in reports on the application of the Indigenous and Tribal Populations Convention, 1957 (No. 107).<sup>108</sup>

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<sup>108</sup> For example, in Bolivia, the Government has stated in its report on the application of Convention No. 107 that the members of indigenous populations are given preferential treatment as regards recruitment in the areas in which they live, especially for occupations in which they are specialised, such as hunting, fishing, weaving and housing construction.

## CHAPTER IV

### IMPLEMENTATION OF PRINCIPLES

#### General

157. Provision is made for the application of the principles contained in the instruments of 1958 in Articles 2 and 3 of the Convention and in Paragraphs 2 to 10 of the Recommendation. Application consists primarily of declaring a national policy aimed at equality of opportunity and treatment in employment and occupation and pursuing this policy, both directly, in ensuring its observance in services and employment under the control of a national authority and, indirectly, by taking measures to secure its acceptance in other sectors. During the drafting of the instruments, the words "public policy" were replaced by "national policy" to avoid any implication that responsibility for promoting equality of opportunity and treatment in all fields of training and employment falls only on the public authorities.<sup>1</sup> The fact that the State bears the chief responsibility of declaring and pursuing a national policy should not cause one to overlook the essential role of employers' and workers' organisations in promoting the principle of equality at the workplace itself, and the corresponding responsibilities. Lastly, the provisions relating to the application of the principle of the Convention allow considerable flexibility and a wide margin for adaptation to national conditions and practice. The form taken by implementing measures is an important element, but the criterion for application of the Convention should be whether unequivocal results are achieved in pursuing equality of opportunity and treatment in employment and occupation without unlawful discrimination. The first Section of this Chapter will examine the formulation and content of a policy designed to promote equality of opportunity and treatment, while the second Section will outline ways in which such a policy can be implemented.

#### Section 1: Formulation and content of a national policy designed to promote equality of opportunity and treatment

158. Under Article 2 of the Convention, "each Member for which this Convention is in force undertakes to declare and pursue a

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<sup>1</sup> ILO: Discrimination in the field of employment and occupation, International Labour Conference, 40th Session, 1957, p. 110.



national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof". The national policy of equality of opportunity and treatment should, firstly, be clearly stated, which implies that programmes for this purpose should be or should have been set up and, secondly, should be applied, presupposing state implementation of appropriate measures according to the principles outlined in Article 3 of the Convention and Paragraph 2 of the Recommendation. The national policy should, in particular, take into account the fact that measures designed to promote equality of opportunity and treatment in respect of employment and occupation are a matter of public interest and constitute a right of the individual; to this end, "government agencies should apply non-discriminatory employment policies in all their activities; employers should not practice or countenance discrimination in engaging or training any person for employment, advancing or retaining such person in employment, or in fixing terms and conditions of employment; nor should any person or organisation obstruct or interfere, either directly or indirectly, with employers in pursuing this principle; in collective negotiations and industrial relations the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment, or in respect of the terms and conditions of employment".

159. While affirmation of the principle of equality before the law may be an element of such a policy, it cannot in itself constitute a policy within the meaning of Article 2 of the Convention.<sup>2</sup> The incorporation of a Convention in internal law by virtue of ratification is not sufficient to ensure its application in law and in practice.<sup>3</sup> Similarly, the absence of laws and administrative measures expressly introducing inequalities is not sufficient to meet the requirements of the Convention for the elimination of all forms of discrimination.<sup>4</sup>

<sup>2</sup> See Chapter II, Section 2, para. 87 above; while the existence of a general prohibition on discrimination in a constitutional provision may satisfy the requirements of the Convention as regards equality of treatment to the extent that the constitutional provisions are applied by the courts, this cannot, however, be sufficient to ensure dynamic implementation of equality of opportunity.

<sup>3</sup> See RCE 1963, General Report, paras. 21-27 and 35; RCE 1970, General Report, paras. 18-19.

<sup>4</sup> See, for example, Sierra Leone, in RCE 1983, p. 224; see also the General Survey of 1986 on equal remuneration, para. 253: "It is hard to accept statements suggesting that the application of the Convention has not given rise to difficulties or that full effect is given to the Convention, without further details being provided. By its nature, by the way in which it develops, and as a result of the critical character of discrimination with regard to remuneration, the

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Certain forms of discrimination based on race, national or social origin, sex-based occupational segregation and sexual harassment are not, on the whole, caused by an intention to discriminate or by provisions of legislation or regulations, but are rather the result of behaviour, attitudes or an expression of prejudice, in respect of which measures should be adopted for the implementation of the national policy.<sup>5</sup>

### Methods appropriate to national conditions and practice

160. The Committee has already noted earlier that "although the formulation of the national policy in question must comply, in substance, with conditions laid down in the Convention or the Recommendation, it must be underlined that its form is not subject, under these instruments, to any particular conditions".<sup>6</sup> Article 2 of the Convention provides that national policy is to promote equality "by methods appropriate to national conditions and practice". Adjustment to national conditions and practice concerns the methods by which the principles of the Convention are to be implemented within the framework of the national policy of equality which the Government is to declare and pursue; it is not to affect the principles to be applied. The Convention leaves it to each country to use methods which, taking into account national conditions and practice, appear to be the most appropriate in view of their nature, time scale<sup>7</sup> and their timeliness, in order to promote equality of opportunity and treatment in employment and occupation. By describing national policy as one designed to promote equality of opportunity and treatment,<sup>8</sup>

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application of the principle will necessarily unearth difficulties." These comments also hold true for Convention No. 111, perhaps even more so in view of the breadth of its scope.

<sup>5</sup> See, for example, Brazil's statement of purpose of the 1987 Plan of Action on racial discrimination in the labour market: "In Brazilian society, manifestations of racism are not always intentional ... Discriminatory practices are partly rooted in prejudice and common stereotypes influencing individual attitudes, which are daily reflected in institutional machinery in the form of discriminatory, bureaucratic and administrative practices. In the field of labour, they take the form of situations placing Black workers at a disadvantage with respect to White workers ...", Ministry of Labour, Secretariat for Manpower, Brasilia, 1987.

<sup>6</sup> General Survey, 1963, para. 55.

<sup>7</sup> The Government of Sierra Leone states in its report that in the developing countries promotion of non-discriminatory practices should occur gradually and that ILO assistance would be necessary in this area.

<sup>8</sup> See RCE 1984, p. 257: the Committee stated that while it allows the government to choose the methods by which it promotes equality of opportunity and treatment, such a policy "implies that  
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the Convention indicates that implementation of the national policy may be gradual, although some obligations have immediate effect, such as those of declaring a policy, repealing statutory provisions and eliminating administrative practices which are discriminatory, and the duty to report on results obtained. The Convention thus allows considerable flexibility as regards the manner of declaring the policy of equality and of pursuing action designed to implement the principle of equality. A declaration of policy may result from constitutional norms<sup>9</sup> or from legal provisions,<sup>10</sup> or be expressed in a

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once measures have been taken and a certain level of protection against discrimination has thus been achieved, the existing system of protection cannot be dismantled unless its repeal is accompanied by the adoption of an alternative system that increases, rather than reduces, the overall protection afforded".

<sup>9</sup> See above, Chapter I, paras. 33, 37, 39, 48 and 58. The Government of Czechoslovakia stated in its report that the State's entire policy, even where it is not expressly stated, proceeds from the constitutional principle of equality of rights and obligations, which rules out discrimination.

<sup>10</sup> In some countries, legislation on equality of opportunity and treatment is prefaced by a "declaration of policy" which states the purposes of the enactment and places it in a wider context of equality in general, civil rights or social justice. See, for example, United States, Florida, s. 760.01 of the Human Rights Act of 1977; Illinois, s. 1-102 of the Human Rights Act; Indiana, s. 22-9-1-1 of the Civil Rights Law; Kansas, s. 44-1002 of the Act Against Discrimination; Kentucky, s. 344.020 of the Fair Employment Practices Act; Maine, s. 4552 of the Human Rights Act; Michigan, s. 102(1) of the Civil Rights Act; Montana, s. 49-1-102 of the Human Rights Act; New Hampshire, s. 354-A:1 of the Law Against Discrimination; New York, s. 291 of the Human Rights Law; North Dakota, s. 14-02.4-01 of the Fair Employment Practices Act; Oregon, ss. 659.015 to .025 of the Fair Employment Practices Act; Pennsylvania, s. 952 of the Human Relations Act; Rhode Island, s. 28-5-2 of the Fair Employment Practices Act; South Carolina, s. 1-13-20 of the Human Affairs Law; Tennessee, s. 4-21-101 of the Fair Employment Practices Law; Texas, s. 1.02 of the Commission on Human Rights Act; Washington, ss. 49.60.010 to 030 of the Law Against Discrimination; West Virginia, s. 5-11-2 of the Human Rights Act; Wisconsin, s. 111.31 of the Fair Employment Act. As a rule, these declarations of policy state that access to employment, occupation and training is a civil right which should be protected; that the absence of equality of opportunity and treatment also threatens the institutions and undermines the foundations of a free democratic State and endangers the peace, order, health, safety and general welfare of its inhabitants; that the State is responsible for acting to ensure that each individual is able to live a fully productive life; that measures should be adopted to ensure that each individual enjoys equality of opportunity and treatment; that discrimination should be

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declaration of government policy submitted to Parliament or another appropriate body or in any other manner consistent with national practice. It may also result from a combination of such methods.<sup>11</sup> Some countries have stated in their reports that national policy aimed at promoting equality is based on religious principles advocating equality of treatment.<sup>12</sup> The Committee observed on a previous occasion that what matters from the point of view of the Convention is that "this formulation should be such as to define a real 'national policy' and that it should cover all the objectives of this instrument".<sup>13</sup>

### Repeal of provisions inconsistent with a national policy of equality

161. The obligation to declare a national policy designed to promote equality of opportunity and treatment in employment and occupation in accordance with the objectives of the Convention has as its corollary the duty to repeal statutory provisions and modify administrative practices which are inconsistent with this policy. Article 3(c) of the Convention provides that each Member for which the Convention is in force must "repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy" designed to secure equality of opportunity and treatment without discrimination on the grounds indicated in Article 1 of the Convention. While this absolute and universal obligation is a necessary condition for the application of the 1958 instruments, it should be borne in mind that it is only one aspect of their implementation, which also implies the adoption of affirmative action measures to correct de facto inequalities in all fields concerning employment and occupation, whether or not governed by law or by administrative action. Some governments have stated that

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eliminated in the public services, etc. See also the statements of purpose of legislation adopted in this area in certain countries (France, Portugal, etc.), which may be considered to declare or update a policy designed to ensure equality of opportunity and treatment, taking into account the development of the situation: for example, Portugal, RCE 1979, p. 187. See also Japan: s. 6 of Law No. 113 of 16 June 1972 respecting the improvement of the welfare of women workers, which contains a guarantee of equality of opportunity and treatment between men and women in employment, as amended in 1985, provides that the Minister of Labour shall formulate a basic policy concerning measures to be taken for the welfare of women workers and the matters to be covered by such a policy.

<sup>11</sup> See the description of the implementation of the Convention in Australia in C.E. Landau: The influence of ILO standards on Australian labour law and practice, in International Labour Review, 1987, Vol. 126, No. 6, pp. 669-690.

<sup>12</sup> See reports sent by Saudi Arabia and the United Arab Emirates.

<sup>13</sup> General Survey, 1963, para. 55.

legislation has been reviewed in order to delete provisions involving discriminatory measures restricting the employment of women<sup>14</sup> or of members of other visible minorities. In some countries, bodies set up to implement the national policy of equality play an important part in the amendment of legislation and administrative practices which are inconsistent with the principle of equality.<sup>15</sup> In examining the application of the Convention, the Committee has often noted with satisfaction the express repeal or amendment of provisions of legislation or regulations which were discriminatory on the grounds referred to by the Convention, so as to remove any doubt or uncertainty as to the situation in positive law in this respect.<sup>16</sup>

#### Contents of national policies

162. In order to preserve the flexibility which is essential for its application, the Convention does not specify the content of measures which may be adopted for the promotion of effective equality of opportunity and treatment in employment and occupation, and leaves it to States to determine the content of such measures in accordance with the objective of the Convention.<sup>17</sup> The content of the national policy should, however, draw its inspiration from the principles of the Convention: it is essential that it should be designed to promote equality of opportunity and treatment by eliminating all distinctions, exclusions or preferences in law and in practice; that it should cover the different grounds of discrimination expressly referred to (race, colour, sex, national origin, religion, political opinion and social

<sup>14</sup> Australia: Western Australia, review of all legislation with a view to eliminating sex-based discrimination; Guyana, adoption of Circular No. 1/1973 of 12 February 1973 of the Ministry of the Public Service, eliminating all forms of discrimination in the public service; Norway, amendment of the Seamen's Act to eliminate certain forms of discrimination.

<sup>15</sup> Canada: Canadian Human Rights Commission, Annual report 1982, p. 10: recommendation to amend the Unemployment Insurance Act to remove discriminatory treatment based on sex, marital or family status; recommendation to amend the Indian Act, see above, Chapter IV, Section 3, paras. 19-21.

<sup>16</sup> See above, Chapter I, Section 3, paras. 25, 40 and 41. See also Chile in RCE 1987, p. 358: repeal of texts under which arbitrary and discriminatory decisions could be taken without a possibility of defence for the persons concerned.

<sup>17</sup> See, for example, Article 5 of the Workers with Family Responsibilities Convention, 1981 (No. 156) which specifies the content of measures to be taken (subject to national conditions and possibilities) to enable persons with family responsibilities to engage in or obtain employment without being subject to discrimination: to take account of the needs of workers with family responsibilities in community planning, to develop or promote community services such as child care and family services and facilities. See also Article 3, paragraph 1, of the Equal Remuneration Convention, 1951 (No. 100): objective appraisal of jobs.

origin);<sup>18</sup> and lastly, that it should provide for the implementation of the principle of equality of opportunity and treatment in all fields of employment and occupation.<sup>19</sup> The Committee has noted, on a previous occasion, the importance of taking "supplementary action ... to ensure that national policy clearly states that its purpose is to promote equality of opportunity and treatment for all the categories of persons covered by the Convention, in all forms of employment and occupation, whether public or private (having regard - as provided by the 1958 instruments - to the methods appropriate to national conditions and practice)".<sup>20</sup> The variety of ways in which discrimination on the grounds referred to in Article 1 of the Convention is manifested makes it necessary to adopt differentiated measures. The elimination of certain forms of discrimination based on sex, race, national or social origin lends itself more easily to the adoption of affirmative action while for other forms of discrimination, such as that on account of political opinion or religion, the objectives of the Convention might generally be adequately served by an attitude of abstention, within an appropriate legal framework.<sup>21</sup> Lastly, supplementary measures correspond to the scope of the national policy: identification of forms of discrimination based, for example, on social origin will lead to the adoption of measures which, within the area covered by the Convention, will affect the entire educational system and employment policy.<sup>22</sup>

163. In the light of the information sent by a number of countries, the Committee has noted substantial change in the approach of the national policy of equality of opportunity and treatment, which has broadened from an essentially standard-setting approach to embrace economic and social measures. At first, standard-setting mechanisms to eliminate discrimination were guided by the general principle of equality, which subsequently became more specific and incorporated equality in employment and occupation.<sup>23</sup> The great number of constitutions dealing with the principle of equality bear witness to

<sup>18</sup> See above, Chapter I.

<sup>19</sup> See above, Chapter II.

<sup>20</sup> General Survey, 1963, para. 65.

<sup>21</sup> See, however, the legislative and administrative measures and incentives towards affirmative action taken by employers recommended by the Standing Advisory Commission on Human Rights against religious discrimination in Northern Ireland. Standing Advisory Commission on Human Rights: Religious and political discrimination and equality of opportunity in Northern Ireland: Report on fair employment, London, 1987, pp. 170-183.

<sup>22</sup> See Article 1, paragraph 2(c), of the Employment Policy Convention, 1964 (No. 122).

<sup>23</sup> In some cases, large-scale social movements have contributed greatly towards the adoption of these texts; a case in point is the United States, where the vast support surrounding the movement for the defence of the civil rights of Blacks led to the adoption of the 1964 Civil Rights Act; the United States Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination, a Statement, 1981.

the fact that this approach is widespread, even though some aspects of discrimination are not covered and the practical application of these provisions in the legal system varies considerably according to the country concerned. These general principles, which had often long existed in legal texts, have been supplemented and made more specific by legislation banning discrimination in employment and occupation, or new provisions concerning equality in acts specific to various branches of activity (for example the civil service) or certain aspects of employment. In several countries, this legislation has been adopted in application of regional treaties,<sup>24</sup> of specific agreements on these matters concluded between countries within a same region<sup>25</sup> or of regional programmes.<sup>26</sup> Under law, the ban on unwarranted discrimination has taken the form of increased legal protection for individuals and the definition of a range of penalties. Courts and case law have often played a vital role in establishing individual rights. Penalties have taken various forms: civil action to redress wrongs incurred and damages, financial compensation, payment of back wages, reinstatement in the enterprise; penal sanctions; administrative penalties; loss of registration as a contractor with the public authorities, etc. Finally, institutional machinery has been set up to supervise the effectiveness of the legislation on equality and to promote this legislation. This has enabled employers' and workers' organisations, alongside other bodies

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<sup>24</sup> cf. the influence that the European Economic Community has had on the member States as regards equality of opportunity and treatment between men and women or between nationals of various countries within the community.

<sup>25</sup> cf. the programmes adopted in the field of equality between men and women by the member States of the Nordic Council.

<sup>26</sup> cf. the programme for the Industrial Development Decade for Africa, 1980-1990, adopted at the 1980 Lagos Economic Summit. The equitable participation of women in the industrialisation process entails: (a) equal access to and participation in formal programmes at different levels in educational and vocational training institutions and in adult educational programmes which teach not only literacy, but marketable income-generating skills; (b) equal access to economic resources including land and credit in the small-scale sector; (c) equal participation in decision-making and planning processes in enterprises and administrations; (d) equal participation in non-traditional female occupations which have good promotional possibilities and increasing employment prospects in both the large- and small-scale industrial sectors; (e) equal rights to control the fruits of one's labour and equal job security; (f) encouragement to form and participate actively in collective organisations including trade unions; (g) equal priority in the development of technologies that will relieve women's work burden in the home and at the workplace; (h) equal and non-discriminatory protection of all industrial workers under labour legislation; (i) equal publicity given to women's activities, and (j) the recognition of the importance of women's dual roles and the provision of extensive social investments to lessen women's conflicting work burdens.



concerned, to take part in drafting and applying national policy. In many cases, this legislation and regulations have not reflected a general will but have preceded the changes they have contributed to bringing about. Furthermore, the perception of discrimination has been strictly confined within and limited by legislation on equality. For instance, the recognition of the principle "equal pay for equal work" implies that discrimination only exists in the case of the same work, whereas the introduction of the concept of equal pay for work of equal value, i.e. of comparable worth, reveals new aspects of discrimination.<sup>27</sup>

164. At a further stage, this movement for equality of opportunity began to turn upon actual practice, giving rise to the definition and implementation of affirmative action programmes. Once it had been generally acknowledged that an individual was entitled to equality of treatment irrespective of his or her race, sex or national extraction, efforts focused on changing practices throughout society and especially within the enterprise. In most cases, inequality in employment results from the fact that several categories of the population remain unaffected by improvements in job prospects or training, from which other categories have benefited. The policy of equality of opportunity involves making available to each and every one, without discrimination on the basis of race, colour, sex, national extraction, political opinion, religion and social origin, comparable means and prospects in training and activities. Affirmative action programmes call upon economic and social policy as a whole<sup>28</sup> and extend far beyond the legal framework and regulations establishing them and enabling them to be carried out on the required scale.<sup>29</sup> In some cases, social experiments are now being carried

<sup>27</sup> See 1986 General Survey on Equal Remuneration, paras. 44 et seq. and 255.

<sup>28</sup> See for example the Government of Egypt's statement in its report to the effect that "measures aimed at promoting equality of opportunity or treatment in employment or occupation should be part of the State's general policy".

<sup>29</sup> See Denmark: In 1985, the Parliament adopted a resolution concerning an action plan for equality between men and women; Finland: five-year equality programme for 1980-1985; India: the seventh five-year plan (1985-89) introduces a component on "women" and a multisectoral approach to bring women's promotion programmes in line with each other; Indonesia: the fourth five-year plan (1984-89) provides for improved information for women on their rights and duties, better skills and protection of women workers, the setting up of job opportunities for women, etc.; Iceland: five-year action plan concerning measures to guarantee equality between the sexes, adopted by the Parliament (Althingi) on 10 February 1987; Norway: action plan for equality adopted by the Parliament (Storting) for 1986-90: the plan provides for many measures to promote the position of women in education and on the labour market; Netherlands, political emancipation programme (Beleidsplan Emancipatie) adopted by the Council of Ministers in 1984; Senegal: women's action plan adopted (footnote continued on next page)

out to eliminate discrimination based on sex or national extraction; these take the form of pilot projects,<sup>30</sup> the findings of which are studied in great detail before any decision to extend them and make these measures widespread is taken. In order to avoid a situation whereby prospects for equality of opportunity lose their edge or fade, it is even more vital that there should be a national policy to promote equality of opportunity and treatment in employment and occupation to eliminate all discrimination in this field.

165. Upon reading the available information, it would seem that many countries have adopted and applied measures aimed at certain groups of the population, such as women and ethnic minorities. Although these measures are indeed action to be considered within the scope of the Convention, they appear far too often to be set apart, limited and unrelated to a national policy of equality of opportunity and treatment. In their reports, governments mention the existence of general texts laying down basic guide-lines for social and economic development; however, these texts rarely attempt to integrate the role of the principle of equality without discrimination based on the grounds set forth in the Convention.<sup>31</sup> Measures to promote the participation of certain groups or of women in development sometimes lack this orientation towards equality, thus undermining achievement of the very economic and social objectives upon which they appear over-concentrated.

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on 25 March 1982 by the Parliament; the plan gives a detailed list of the financial targets in various economic sectors as regards training, health, nutrition and job creation; Switzerland: legislative programme entitled "Equality of rights between men and women"; Tunisia: national development programmes stressing that everyone should have access to employment and, in the field of education, setting objectives pertaining to the promotion of equality of opportunity: schooling of children of both sexes having reached statutory school-attendance age, widespread introduction of mixed schooling, stepping up of measures aimed at cutting school drop-out rates, etc.; Yugoslavia: "Resolution on the main guide-lines of social action to promote the status and economic and social role of women in socialist joint worker-management society" adopted by the Parliament of the Socialist Federal Republic of Yugoslavia on 30 March 1978; Zimbabwe: one of the targets of the five-year development programme (1981-85) is to do away with discriminatory practices preventing women from participating in economic life.

<sup>30</sup> See for example below, para. 233.

<sup>31</sup> See for example Chapter I, Section 3, para. 55; see for example Angola: "Orientações Fundamentais para o Desenvolvimento Económico-Social, 1981-1985", points IV and VI on instruction and education, the efficient use of human resources and the raising of workers' skill levels; Nepal: national employment policy of the Kingdom of Nepal; Nicaragua: national training system (Sistema nacional de capacitación-SINACAP).

Affirmative action to correct de facto  
inequalities in training and employment

166. The adoption of an affirmative action programme stems from the observation that the banning of discrimination is not enough to eliminate it in actual practice. In Canada, the purpose of the Act respecting employment equity is "to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences".<sup>32</sup> The concept of "positive action programme" encompasses measures which set out to eliminate and make good any de facto inequalities, thereby enabling members of groups suffering from discrimination to work in all sectors of activity and occupations and at all levels of responsibility. It incorporates the concept of affirmative action.<sup>33</sup> The concept of "affirmative action" also differs from the concept of special measures of protection or assistance, laid down in Article 5, paragraph 2, of the Convention. This latter provision merely establishes that special measures of protection or assistance designed to protect various vulnerable groups or social functions are not deemed discrimination under the terms of the Convention; while the concept of "affirmative action" views these measures as the means to promote equality of opportunity of various social groups which are subject to discrimination. Measures of protection are established on a permanent basis (at least until such a time when technical development makes them redundant), whereas

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<sup>32</sup> S. 2 of the Employment Equity Act of 1986. According to the Canadian Labour Congress, a true affirmative action programme includes three types of inter-related measures: permanent equality of opportunity measures, which set out to guarantee equality by eliminating discriminatory practices within the enterprise; remedial measures which aim at correcting the effects of discrimination suffered by a group of persons by granting them several preferential advantages for a temporary period; support systems which aim at overcoming various employment problems encountered by members of disadvantaged groups and which are accessible to everyone, whether or not they belong to a disadvantaged group. (ICFTU, International trade union seminar on affirmative action, Brussels, 6-8 Oct. 1986.)

<sup>33</sup> In the United States this concept was introduced for the first time in Executive Order No. 10925 of 1961 which went beyond requiring the undertaking not to discriminate to call upon the contractor to take affirmative action to ensure "that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, colour, or national origin". This was taken up again in section 202(1) of Executive Order No. 11246 concerning government contractors and subcontractors (E.O. 11246 of 24 Oct. 1965) and specified in Order No. 4 of the Secretary of Labor. S. 2 of Executive Order No. 11478 concerning federal employees (E.O. 11478 of 8 Aug. 1969) uses the concept of affirmative programmes.

"affirmative action" should no longer be necessary as soon as the target social groups are in a position to exercise their rights to equality in practice.

167. Several countries have adopted provisions concerning affirmative action, thereby giving it a definition. In Australia, the Affirmative Action Act of 1986<sup>34</sup> provides that an affirmative action programme means a programme designed to ensure that appropriate action is taken to eliminate discrimination against women and to promote equal opportunity for women in regard to employment matters. In Belgium, a Royal Decree indicates that the aim of affirmative action is to redress de facto inequalities affecting women's opportunities.<sup>35</sup> In a province of Canada, regulations stipulate that affirmative action programmes should redress the situation of those groups, including women, members of ethnic communities, disabled persons and indigenous peoples, who are subject to discrimination which is banned by law.<sup>36</sup> In France, the Labour Code provides that a plan for equality in employment between men and women, which includes temporary measures directed only at women to make good any de facto inequalities affecting their prospects, may be negotiated in the undertaking.<sup>37</sup> These definitions incorporate the basic characteristics of affirmative action: the elimination of discrimination, the promotion of equality of opportunity; and ways to ensure that the means to attain objectives are both timely and suitable.

168. Affirmative action programmes may be applied both in the public and private sector; however, the way in which they are applied in both sectors usually differs according to whether or not they are subject to the direct supervision of a national authority.<sup>38</sup> They may be prompted by one or several parties concerned, by a recommendation of a body entrusted with applying the policy of equality or by a court ruling. It would seem that the success of these affirmative action programmes is very closely bound up with the dialogue between employers and workers, which must be as encompassing as possible in order to obtain the full support of all concerned. In this field, the bodies entrusted with promoting, applying and supervising these programmes have a vital role to play.<sup>39</sup> Although some of these programmes have been established at the national - even

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<sup>34</sup> S. 3(1) of the Affirmative Action (Equal Employment Opportunity of Women) Act, 1986.

<sup>35</sup> S. 1 of the Royal Decree of 14 July 1987 concerning measures to promote equality of opportunity between men and women in the private sector.

<sup>36</sup> Quebec, s. 1 of the regulation on affirmative action programmes. See also note 32 above. Most of the provinces have adopted or are in the process of adopting similar measures.

<sup>37</sup> Ss. L.123-3 and 4 of Act No. 83-635 of 13 July 1983 to amend the Labour Code, LS 1983-Fr. 2.

<sup>38</sup> See below: Section 2, Subsections 1 and 3 of the present Chapter.

<sup>39</sup> See below: Section 2, Subsection 2 of the present Chapter.

sometimes at the international - level,<sup>40</sup> the fact remains that, because of their very specific and practical nature, they are most effective within the enterprise. Most texts dealing with affirmative action programmes are backed up by regulations, guide-lines or information notes enabling those concerned to apply them as their framework and broad outlines are contained in law. As a general rule, affirmative action programmes contain four components: specific objectives as to the actual number of persons represented in the group covered by the programme; necessary measures to redress the effects of the discrimination noted; a timetable to attain the objectives set and apply measures planned to this effect; and supervisory machinery to monitor progress and assess the difficulties encountered in applying the programme, as well as to determine what adjustments should be made.

169. Most of the affirmative action programmes brought to the Committee's attention have been adopted to correct the effects of discrimination against women. Affirmative action programmes have also been directed at ethnic groups or disadvantaged groups (disabled workers, older workers). The wide range of social and economic situations, and by extension, the problems to be solved, determine the content of these programmes. The Committee has given several examples of affirmative action programmes in previous Chapters to illustrate the way in which several countries fulfil their obligations in application of the Convention. Other examples will be given in the following Section. They were selected on the basis of information available. In this respect, the Committee regretted to note that governments provided little information on practical measures taken to apply the principle of the Convention.<sup>41</sup>

## Section 2: Measures to ensure the implementation of a national policy of equal opportunity and treatment

170. Article 3 of the Convention specifies some of the areas and means of action which must be covered by a national policy aimed at promoting equality of opportunity and treatment in employment and occupation without discrimination on one of the grounds referred to in the Convention, in order to ensure that it is effectively applied. Under this Article, each State which has ratified the Convention undertakes, by methods appropriate to national conditions and practice, to discharge different kinds of obligations: on the one hand, obligations to take action, whether to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy of equality (Article 3(c))<sup>42</sup>

<sup>40</sup> For instance, the BRYT programme drawn up by members of the Nordic Council; see above, Chapter II, Section 1, para. 85.

<sup>41</sup> See Introduction above, para. 15.

<sup>42</sup> This primordial obligation, which is closely linked to the formulation of national policy, has already been examined in para. 161 above.

or to pursue the policy in respect of employment under the direct control of a national authority (Article 3(d)) and in the vocational guidance, vocational training and placement services under the direction of a national authority (Article 3(e)); on the other hand, the State has an obligation as to means as regards the enactment of legislation and promotion of educational programmes designed to secure the acceptance and observance of the policy (Article 3(b)), and co-operation with employers and workers in promoting such acceptance and observance (Article 3(a)). The Recommendation specifies that each Member should also, where practicable and necessary, promote the observance of the principle of equality of opportunity and treatment in employment and vocational guidance, vocational training and placement services by encouraging its application in state, provincial or local government departments and in industries and undertakings operated under public ownership or control and by laying down conditions relating to such observance for eligibility for public contracts, grants and licences (Paragraph 3(b)). The Recommendation also provides for the establishment of appropriate agencies for the purpose of promoting general application of the policy of equality and, in particular, to take measures to inform the public, examine complaints and render opinions or issue decisions concerning the manner in which discriminatory practices revealed should be corrected (Paragraph 4). It also calls for continuing co-operation between the competent authorities, representatives of employers and workers and appropriate bodies to consider what further positive measures may be necessary in the light of national conditions to put the principle of the Convention into effect (Paragraph 9).

171. Before examining, in the following subsection, the application of the Convention to sectors under the direct control of a national authority and going on to consider ways in which the Convention can be applied more widely, one should recall here the role of legislation aimed at ensuring acceptance and observance of the policy of equality, which is most commonly expressed in such legislation.<sup>43</sup> From the available information, it appears that the enactment of constitutional or legislative provisions or regulations on the subject has been, and still is, one of the most widely used means of encouraging acceptance and observance of national policy designed to promote equality of opportunity and treatment in employment and occupation. The number of texts adopted in a great many countries illustrates the importance of this occurrence, which should not be underestimated, although legislation may have focused to a greater extent, if not exclusively in certain cases, on certain grounds of discrimination. Article 3(b) of the Convention, in indicating that the State must, by methods appropriate to national conditions and practice, enact such legislation as may be calculated to secure the acceptance and observance of the policy defined in Article 2 of the Convention, does not impose a general obligation of legislating in all of the areas covered by the Convention. The State must enact legislation in cases where such intervention is an

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<sup>43</sup> See also paras. 163-164 above.

appropriate means of implementing national policy, taking into account national conditions and practice, but certain areas may be governed by other measures, such as collective agreements, which enable the principle to be satisfactorily applied without the need for legislative intervention. However, where rules are issued on a specific area covered by the Convention, the texts adopted should refer to the principle of equality of opportunity and treatment without discrimination on the grounds referred to in Article 1. Moreover, as regards the enactment of legislation, the Committee has recalled above that, when provisions are adopted to give effect to the principle of the Convention, they should include all of the grounds of discrimination mentioned in Article 1 of the Convention.<sup>44</sup> The scope of the provisions adopted varies considerably according to the nature of the text. Constitutional standards lay down general principles, the extent of whose application in practice varies considerably from one country to another. They may also provide for subsequent adoption of Acts designed to remedy particular forms of discrimination.<sup>45</sup> Specific legislation adopted on the subject of discrimination often covers a number of grounds which are limited to sex or race. The problem of inadequate coverage arises in a different form in the case of labour codes or specific legislation on labour or employment which is limited in scope to salaried employees, who account for a proportion of the active population which varies considerably from one country to another, according to the country's level of economic development. Moreover, certain salaried employment, in particular in the public service and certain branches of activity such as the merchant navy, often lies outside the scope of labour codes, and no labour code can secure equality of opportunity and treatment under the terms of the Convention for self-employed occupations.<sup>46</sup> However, inclusion in this type of legislation of provisions designed to apply the principle of equality would serve a dual purpose: on the one hand, it would make it possible to cover every aspect of employment (recruitment, working conditions, remuneration, dismissal, retirement, social security, etc.) and, on the other, by granting rights to all workers without distinction, such legislation would cover all of the grounds of discrimination referred to in the Convention. The contents of constitutions, legislation and regulations adopted have been examined in the relevant sections of the various Chapters of this Survey, and there is therefore no need to recall them here.

<sup>44</sup> See above, Chapter I, para. 58.

<sup>45</sup> See, for example, Nicaragua: Constitution of 1986, LS 1987-Nic. 1, art. 91: "The State is under an obligation to enact laws designed to promote action which will ensure that no Nicaraguan is subject to discrimination because of his or her language, culture or origin." The Committee has no information regarding the practical application of this provision.

<sup>46</sup> See Chapter II, Section 2, para. 89.



Subsection 1: Application of the principle of the  
Convention to sectors under the  
direct control of a national authority

Employment under the direct control  
of a national authority

172. The Committee has already highlighted the importance of the State's responsibility in pursuing a policy of equality of opportunity and treatment in respect of employment under its control. The use of the methods of direct application of this policy available to the State is one of the obligations laid down by the Convention. The extent of the sector covered by the category of employment under the direct control of a national authority may vary considerably: in some countries, only part of the public service would be under such control, while in others, most employment falls in this category.

173. Many countries refer in their reports to constitutional or statutory provisions under which equality of citizens with respect to public employment is established, without specifying the conditions in which they are applied in practice. These conditions are of prime importance as regards matters such as recruitment, promotion or dismissal, particularly to secure representation of minority groups characterised by their race, colour, national origin or language and to increase representation of women in all types of employment under the control of a national authority. According to the available information, affirmative action programmes have been adopted in several countries. Concern to increase the overall number of members of disadvantaged groups in the public service, which is the prerequisite for their participation in the latter, is often coupled with the desire to secure representation of members of these groups at all levels of the public service, including the higher levels. Consequently, affirmative action programmes focus not only on recruitment policy, but also on issues related to training in employment which, to a great extent, determine promotion policy. Such programmes have features in common, regardless of the category of persons targeted: the aim is to increase the representation of such persons and multiply their job opportunities; the programmes differ in their approach and scope. The examples given below illustrate the common features and differences.

174. In Canada, the Public Service Commission has drawn up and is carrying out a programme to promote the employment of native peoples and visible minorities, with the long-term objective of ensuring that they are equitably represented in proportion to their availability on the labour market. The various programmes aim, on the one hand, to further the employment of these groups, by promoting public service employment as a viable career choice and, on the other, to improve career development and training of new recruits and people already employed.<sup>47</sup> In Australia, a systematic approach to the

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<sup>47</sup> The National Indigenous Development Programme set up in 1983 prepares participants to assume middle and senior management  
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identification and elimination of institutional barriers to equal employment opportunity in statutory authorities under federal jurisdiction has been adopted in the form of an Act.<sup>48</sup> Part II of the Act sets out the minimum contents of an equal opportunity programme: informing employees of the contents and results of the programme; appropriate staff to administer the programme; consultation with appropriate trade unions; consultation with employees, especially those in the designated groups; collection and recording of relevant job statistics; examination of policies and practices to identify discrimination or lack of equal employment opportunity, etc. This legislation applies to women and a number of designated groups, namely aborigines, Torres Strait Islanders, people with disabilities and migrants whose first language is not English. In the Netherlands, the Government drew up a policy in 1983 aimed at reducing inequality between minority groups and other groups in society and to improve opportunities for members of minority groups to obtain middle- and senior-level jobs. Measures have been adopted to improve access of such groups to public sector employment, in particular in posts where they have contact with the public. Under the terms of an agreement concluded in April 1986 between the Government and the most representative organisation of the ethnic minority of Moluccan origin, the Government expressed itself in favour of giving a fair share of jobs in the public service to ethnic minorities and of increasing access to public service employment for such groups.<sup>49</sup> In New Zealand, the Government has stated that programmes have been drawn up with a view to increasing the number of Maoris and Pacific Islanders and to improve access of these groups to senior positions. In Sweden, affirmative action with regard to women is governed by agreements on equal opportunity in the public sector concluded between the National Agency for Government Employers and trade union organisations. In the Philippines, a Letter of Instructions enjoins all ministries, offices, agencies, local governments and government-owned and -controlled corporations to take affirmative steps for the promotion, regardless of sex, of equality of employment. It suggests that qualified women be appointed or

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responsibilities and enables them to acquire the necessary skills and knowledge. The Northern Careers Programme aims at increasing the representation of native people in the northern regions. The Visible Minority Employment Programme offers resources to federal departments to appoint members of visible minority groups on an indeterminate basis. As part of this programme, training modules have been developed for newly appointed members of such minorities and their managers.

<sup>48</sup> The Equal Employment Opportunity (Commonwealth Authorities) Act 1987.

<sup>49</sup> A Bill has been submitted to Parliament to amend the Foreign Nationals (Public Service) Act of 1858 with a view to promoting the access of foreigners, including members of ethnic minorities, to employment in the public sector. The Bill sets forth positions open exclusively to Dutch nationals, all others being open to foreigners with a work permit.

recommended for appointment to local or national positions with planning, policy and decision-making functions.<sup>50</sup> In the Federal Republic of Germany, a Directive adopted in 1986 provides, inter alia, for measures to increase opportunities for recruitment of women in sectors where they are under-represented and to improve their opportunities of career development and promotion.<sup>51</sup> In Austria, plans of action have been carried out in administrations as regards hours of work, training courses, recruitment, promotion and job classification under a programme for the promotion of women in the federal public service, targeted indiscriminately at men and women public servants in the lower categories where there is a high proportion of women, based on the idea that any measure for the improvement of working conditions of staff in these categories will have a direct and immediate effect on women.<sup>52</sup>

175. In a number of countries, the existence of a more or less extensive public sector or the absence of a private sector may add to the State's responsibilities as regards application of national policy. One of the main objectives laid down in the guide-lines for the economic and social development of the USSR for the period 1986-90 is the improvement of working conditions for women.<sup>53</sup> Measures are being adopted to create special working conditions for women which are more favourable than those for men as regards work schedules and hours of work, taking into account family responsibilities in general and the upbringing of children, particularly infants. In addition, the social development plans of the enterprises set forth the tasks for the improvement of the working and living conditions of women in the light of local possibilities. Nation-wide measures for the improvement of the conditions for the participation of women in public production, the conditions for the development of women themselves and their children are supplemented by relevant measures adopted at the local level.<sup>54</sup> In Poland, the Council of Ministers has issued a programme of action to improve the socio-occupational status and living conditions of women, covering 22 economic sectors and to be implemented from 1987 to 1990.<sup>55</sup> In other countries, affirmative action programmes are viewed as essential elements of human resource management within the enterprise and of productivity improvement.<sup>56</sup>

<sup>50</sup> Letter of Instructions No. 974 of 5 Jan. 1980.

<sup>51</sup> Directive of 24 Feb. 1986 respecting the occupational promotion of women in the federal administration.

<sup>52</sup> Programme for the promotion of women in the federal public service, adopted by Decision of 10 Nov. 1983.

<sup>53</sup> Guide-lines for the economic and social development of the USSR for the period 1986-1990 and up to the year 2000, Moscow, 1985.

<sup>54</sup> See V. Steshenko: "The demographic and economic aspects of women's work in the Ukrainian SSR", Women at Work, No. 1/1986, p. 35.

<sup>55</sup> CEDAW, A/42/38.

<sup>56</sup> See, for example, the Programme of Employment Equity in Crown Corporations implemented by the Canadian Federal Government on 8 Mar. 1985: "Implementation of Employment Equity will: improve the organisation's overall human resources management through analysis of

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176. The economic difficulties encountered in some countries have, in certain cases, entailed reductions in the resources allocated to such affirmative action programmes, which have a detrimental effect on the achievement of equality of opportunity for the persons concerned and reinforce existing discrimination.<sup>57</sup> The Committee has already emphasised that pursuing a policy of equality of opportunity in public sector employment is of particular importance "as an instrument for promotion and integration, and may open the way to all other measures. It has an outstanding role to play in setting an example; ... At the same time, public employment constitutes an area in which the problems of discrimination arise in a particularly sensitive manner; inequality is felt here much more, since the attitude of the State itself, through its representatives, is in question".<sup>58</sup> The credibility of a policy of equality of opportunity in the eyes of the public depends to a great extent on whether such a policy is applied in the public sector.

## Employment for the performance of public contracts

177. The performance of public contracts is an area in which the public authorities may have means of directly influencing employment practices.<sup>59</sup> The legislation of several countries contains provisions to the effect that clauses relating to equality of opportunity and treatment should be included in public contracts.<sup>60</sup> The Committee considers that the possibility of resort to this method of application of the principle of equality of opportunity and treatment should be given careful examination in other countries and that information should be provided in this regard. A Federal Contractors' Programme was set up by the Federal Government of Canada in 1986 under the Employment Equity Act. Companies employing 100 persons or more and who wish to bid on contracts amounting to a certain sum to supply goods and services to the Federal Government are required to commit themselves to implement employment equity and to

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its current workforce and employment systems; widen employment and career development opportunities for underutilised groups in the organisation's workforce; and improve labour productivity by more clearly identifying and effectively using designated group skills and potential." Treasury Board of Canada: Employment Equity for Crown Corporations, Policy and Reference Guide, Ottawa, 1986. See also s. 2 of the Employment Equity Act 1986.

<sup>57</sup> See ICFTU, International Trade Union Seminar on Affirmative Action, Brussels, 6-8 Oct. 1986, para. 15: "Women are specially liable to suffer from reductions in the public service, in terms of loss of jobs, essential support services, and programmes promoting equality."

<sup>58</sup> General Survey, 1963, para. 94.

<sup>59</sup> cf. Recommendation No. 111, Paragraph 3(b)(ii); see para. 171 above.

<sup>60</sup> Canada, United States.

certify this commitment as a condition of their bid. The terms and conditions of this commitment include several criteria such as the establishment of the goals for the hiring and promotion of designated group members,<sup>61</sup> the elimination of policies or practices that hinder designated group members, and the adoption of special measures to ensure that the goals are achieved. Such enterprises may be subject to on-site compliance reviews and, if failures to implement employment equity are observed, sanctions will be applied, including the eventual exclusion of the employer from future government business.

#### Training and vocational guidance

178. In requests addressed directly to several countries, the Committee asked governments to state what measures have been adopted to ensure that the principle of equality of opportunity and treatment laid down in general and sometimes restrictive terms in their constitutions is applied in practice, and whether such application takes the form of specific provisions in legislation or regulations, or is carried out through administrative measures or under court supervision. Several countries stated that the policy of equality of opportunity and treatment in training was being applied through the provision of universal and free primary education and free technical and vocational education, as well as assistance towards pursuing studies and acquiring occupational qualifications,<sup>62</sup> including training in employment. In other countries, emphasis is placed on measures to supplement overall training policy. A number of developing countries have limited resources for training, which, in practice, constitutes a barrier to equality of opportunity for the entire population. Where there are not sufficient resources to set up or maintain a system of universal education adequate to cover the needs of pupils of both sexes, only a minority has the opportunity of achieving the necessary educational level for admission to vocational training. Such difficulties may be, to a fairly large extent, palliated by literacy programmes aimed at certain population groups, but the resources for vocational training are also limited, making it impossible to cover all of the persons with potential ability. In these conditions, it is necessary to have a system of selection, from which it is essential that care be taken to eliminate any discrimination by basing such selection exclusively on an objective assessment of candidates' abilities and knowledge.

179. Training is the key to promotion of equality of opportunity. The Committee has stated above that any discrimination

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<sup>61</sup> Under s. 3 of the Act, designated groups are women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada.

<sup>62</sup> Venezuela: The Government stated in its report that, in practice, access to university education is relatively difficult for young persons from disadvantaged social backgrounds due to the fact that such persons do not have the resources necessary to enter university. To remedy this situation, there are various systems for the provision of grants.

in access to training will be perpetuated and intensified at the later stage of employment and occupation. In its previous General Surveys on the application of the 1958 instruments, the Committee emphasised the large number of measures taken in most countries with a view to promoting, in law and in practice, the access to training of members of disadvantaged groups. The available information always indicates that efforts are being made to this end, but the Committee notes that in countries affected by economic difficulties, training programmes are reduced or even abandoned for lack of resources. It is likely that members of disadvantaged groups are the first to be affected by such restrictions. Bearing in mind that training is a form of economic investment in future productivity, the consequence of such a reduction of resources will be to deprive society as a whole of a considerable growth potential. Observance of the policy of equality of opportunity and training is not a superfluous element whose elimination would only result in budget savings, but a means of securing full participation of the entire population, without exception, in economic activity.

180. Affirmative action undertaken in this respect is partly aimed at increasing the participation of members of disadvantaged groups in training activities in general, and usually means increasing the number of participants from such groups. As a result, school attendance of girls is increasing in many countries. However, when looking at the overall figures, care must be taken to examine the differences which may exist in the attendance rate of girls, for example between rural and urban areas, or the drop-out rate of girls. In this respect, the Committee recalls that universal compulsory and free primary education is one of the cornerstones of a policy of equality of opportunity and treatment in employment and occupation.<sup>63</sup> In some cases, mechanisms will be set up to allocate places according to a quota system or reserving them for members of disadvantaged groups. Affirmative action may consist of raising the occupational qualifications of members of disadvantaged groups with a view to improving their chances of promotion or remedying various forms of occupational segregation which they may be subject to.

181. Preference may be given to members of ethnic minorities in admission to schools and colleges. In India, a wide range of measures has been set up, including grants, subsidised meals, places in university accommodation and the construction of schools for children of scheduled castes and tribes. The Government has stated that the national education policy adopted in 1986 and the plan for its implementation aim to treat members of scheduled castes and tribes on an equal footing with other members of the population at all stages and levels of the programmes. In particular, at least 75 per cent of children aged from 11 to 14 will attend school until they reach the educational level necessary for admission to higher education; in order to achieve this, authorities must take action by encouraging families to send their children to school, by recruiting teachers from scheduled castes and tribes, by adapting curricula to the interests of such tribes and by printing textbooks in vernacular languages. While

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<sup>63</sup> See Chapter II, Section 1, above.

it is usually for the state concerned to determine measures for the promotion of training of scheduled castes and tribes, the central Government plays an important role by adopting directives and incentive measures. A programme subsidised by the central Government has been included in the Seventh Plan (1985-90) with a view to increasing the capacity of industrial training institutes in the areas with the highest concentration of minorities in ten states. In Spain, projects in support of the marginalised population, which includes a large number of gipsies, have been set up under the Royal Decree on compensatory education, which provides for the allocation of funds and personnel for especially underprivileged sectors of the population.<sup>64</sup> These projects comprise a number of different aspects: schooling at district public establishments for children who previously attended centres operated by the National Secretariat for Gipsies; locating and enrolling children who are not attending school; providing support personnel and material resources to reinforce the schools attended by children from the marginalised population; creating vocational classes for children aged 14 to 15 who are not attending school; training of teachers; and concluding agreements with various associations to examine particular situations as regards the gipsy population and to work out specific educational projects.<sup>65</sup> In Brazil, with a view to giving the same opportunities to candidates from all social backgrounds, measures have been proposed for a more democratic access to higher education (grant of scholarships, evening courses and other non-traditional approaches to education).<sup>66</sup>

182. In a great many countries, emphasis is being placed on equality between women and men in education and training and measures are being adopted to secure equality in primary, secondary and higher educational establishments. Such equality in education and training involves changing programmes and educational materials and methods to promote a positive attitude towards women's aspirations and abilities, and taking measures to provide women with fair access to education and training and with ancillary services such as child care.<sup>67</sup> In some

<sup>64</sup> Royal Decree No. 1174/1983 of 27 Apr. 1983 on compensatory education: "In the educational system, the inequality of some persons on account of their financial position, social status or place of residence means that the policy of education must be compensatory and comprehensive in scope. This must form the constant point of reference for educational policy, but it will be difficult to avoid the continuance of such inequality unless priority is given to groups of individuals who are in an especially marked position of inferiority with regard to the opportunities afforded by the school system."

<sup>65</sup> CERD/C/149/Add. 14, p. 6.

<sup>66</sup> ILO: Social and Labour Bulletin, 2/86, pp. 376-377.

<sup>67</sup> In Hungary, measures have been adopted to encourage further participation of women in technical and vocational education, which is already relatively high. A network of child care centres and kindergartens has been set up and women with young children receive special allowances for the care of each child up to the age of 3.

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countries, particular attention is given to young women seeking their first job and to women who stopped working for some time, for example to look after their children, and who wish to return to work and need to refresh their occupational knowledge.

183. In the USSR, ministries and departments fix annual targets for the enterprises and organisations subordinate to them, relating to vocational training and improvement of skills of women workers. The trade union bodies have set up procedures to supervise the application of such measures and to raise the level of vocational training of women workers and the general education level of women in the work collectives. Since 1979, the annual targets for training and improvement of skills of workers set by enterprises include special measures for women. Improvement of skills or retraining may take place at the woman's own initiative or be suggested by the management or the trade union, taking her wishes into account.<sup>68</sup>

184. Measures have been adopted in different countries to correct situations of sex-based occupational segregation in training.<sup>69</sup> Thus, in Niger, the Vocational Training and Further Training Centre has been opened to female students, which was not the case up to 1984, since the trades in which it provides training (carpentry, electricity, welding, mechanics, etc.) have, because of prejudice and tradition, been considered to be exclusively male occupations.<sup>70</sup> In Algeria,

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Special board and lodging arrangements are also made during periods of study away from their place of work. Part-time and in-service training are both available and encouraged through compensation by reduced working hours, etc. Mothers with young children may, under existing regulations, be employed on a part-time basis. UNESCO, General Conference, 24th Session, 1987, Consultation of member States on the implementation of the revised Recommendation concerning technical and vocational education, 24C/73, Annex 6, pp. 57-58. In the German Democratic Republic, special measures are also applied to enable working mothers to continue their education by cutting down their working time without reduction of their salary; *ibid.*, p. 47.

<sup>68</sup> CEDAW/C/5/Add. 12. Point 11 of Order No. 586 of 21 June 1979 of the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers on the measures to be adopted to improve the vocational training of women provides that "given the prime importance attached to the improvement of vocational training for women, it has been decided that women with children aged under 8 years may improve their skills and undergo retraining while taking time off from work, during which they shall continue to draw their average monthly salary", i.e. a salary based on that of the two months immediately preceding their training.

<sup>69</sup> See Chapter II, Section 1, paras. 82-83 above.

<sup>70</sup> See also Egypt: Since 1981, groups of girl trainees have been enrolled in vocational training centres and centres for training in mechanics and electricity, CEDAW/C/13/Add. 2, p. 5. In Cameroon, measures have been taken to promote mixed technical training establishments with a view to creating favourable conditions for more girls to take up industrial trades which up to now have been viewed as male occupations.

the implementation of the educational reform and the efforts made by the Ministry of Labour and Vocational Training to ensure that girls are not limited to training for traditionally female occupations (sewing, secretarial work, paramedical occupations, administration, teaching, etc.) has broadened the range of careers and vocational training trades, which should increase from 13 in 1980 to 41 at the end of the 1985-89 Plan. In India, a working group set up by the Planning Commission to discuss issues relating to science and technology for women has noted the constraints on girls wishing to embark on a scientific career and proposed a series of practical measures to encourage them to take up such careers.<sup>71</sup> In Luxembourg, training in welding has been organised for unskilled women aged under 25.<sup>72</sup> In Hungary, the Government has initiated various measures in education, training and vocational guidance with a view to remedying the occupational imbalance affecting women, in particular by information campaigns, improvement of vocational guidance for boys and girls in the last year of compulsory education as well as for students approaching high-school or university graduation, support for women choosing new trades and by a more up-to-date approach to specialised training with a view to achieving radical changes in the pattern of female employment.<sup>73</sup> In Cyprus, the Government stated that vocational training programmes were being organised and carried out in order to attract women workers to occupations which have traditionally belonged to men.<sup>74</sup> In Jamaica, the Women's Bureau has made an effort to promote vocational training of women in branches of activity where they are not traditionally employed. In Guyana, training courses have been implemented to enable women to acquire skills other than traditional ones. The same applies to members of disadvantaged groups. Taking into account the need to broaden training opportunities for girls is a first step in carrying out affirmative action for the practical application of the policy of equality of opportunity and treatment without discrimination. It is not, however, sufficient. In Sri Lanka, the number of girls attending technical and vocational training courses increased to 27 per cent in 1984. This quantitative

<sup>71</sup> Working group on personnel policies for bringing greater involvement of women in science and technology, Ministry of Social Welfare, Government of India, New Delhi, 1981.

<sup>72</sup> This project has received aid from the European Social Fund as part of its support activities for programmes to promote opportunities for women in jobs in which they are under-represented; ILO: Social and Labour Bulletin, 1/83, p. 150.

<sup>73</sup> E. Gömöri: "Special protective legislation and equality of employment opportunity for women in Hungary", in International Labour Review, 1980, Vol. 119, No. 1, pp. 67-77.

<sup>74</sup> The Government notes in its report that participation of women in some training programmes is low and attributes this to traditional attitudes which tend to discourage women from choosing jobs generally considered to be for men. These attitudes are weakening as a result of efforts made in education for boys and girls and information of parents and the public in general, in an attempt to break down the concept that jobs can be classified according to sex.

increase was coupled with an occupational diversification, since the largest female enrolments in 1978 were in commercial education, but this figure was exceeded in 1984 by attendance in training programmes in industrial and similar activities, which more than doubled from 1978 to 1984.<sup>75</sup> In France, a survey has shown that only a limited number of young girls are attracted to industrial technical training in new technologies; the proportion of girls is under 5 per cent in training for the senior technician's certificate in industrial data-processing, electronics or automated mechanics and 8 per cent in university courses in mechanical or electrical engineering.<sup>76</sup> New technologies do not themselves affect the "male" image of factory jobs. In its Medium-Term Programme on equal opportunities for women, the European Economic Community emphasised that the introduction and extension of new technologies could be a historic opportunity for women, but also involve the risk, in present conditions, of increased occupational segregation to the disadvantage of women. This risk stems partly from inadequate training, often due to the low interest in the area mainly because of traditional views about the roles of men and women, and partly from the fact that the latter are generally employed in the positions which are most likely to change in content or be phased out.<sup>77</sup>

Subsection 2. Co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the national policy

185. In prescribing that Members should "seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance" of the national policy, the Convention (Article 3(a)) emphasises the necessity for active co-operation with these organisations.<sup>78</sup> Co-operation with employers' and workers' organisations is, in general, aimed at in several respects and first of all for the preparation<sup>79</sup> and

<sup>75</sup> UNESCO, op. cit., p. 151.

<sup>76</sup> A.-M. Daume-Richard, C. Flament, M. Lemaire, C. Marry: "Les filles dans les formations de techniciens supérieurs liées aux nouvelles technologies. Le cas de BTS et de DUT d'Aix-Marseille", Laboratoire d'économie et de sociologie du travail, Aix-en-Provence, 1987.

<sup>77</sup> EEC: Equal Opportunities for Women - Medium-Term Community Programme 1986-90, para. 14.

<sup>78</sup> See General Survey of 1986 on equal remuneration, paras. 132 et seq.

<sup>79</sup> cf. Recommendation No. 111, Paragraph 9: "There should be continuing co-operation between the competent authorities, representatives of employers and workers and appropriate bodies to consider what further positive measures may be necessary in the light of national conditions to put the principles of non-discrimination into effect."

monitoring of the application of measures adopted within the framework of the national policy referred to in Article 2 of the Convention. Secondly, at the level of the branch of activity, the undertaking or the establishment, their action is essential to the application in workplaces of the principles of the Convention. Furthermore, it is worth recalling that according to the Recommendation (Paragraph 2(f)), "Employers' and workers' organisations should not practise or countenance discrimination in respect of admission, retention of membership or participation in their affairs".<sup>80</sup> Acceptance and observance of the policy of equality of opportunity and treatment should be reflected in promotional activities on behalf of women and disadvantaged minorities within the employers' and workers' organisations themselves.

186. By using the term "co-operation", which evokes the idea of work performed jointly, the 1958 instruments go beyond the requirement of consultation of employers' and workers' organisations.<sup>81</sup> The extent of this co-operation will depend on the characteristics of the industrial relations systems in the various countries and the degree of involvement of employers' and workers' organisations in existing machinery. It must allow for the positions of the various parties<sup>82</sup> in respect of the areas covered by the Convention (guide-lines and options for schooling and vocational training, rules and operation of placement services, discrimination-free active employment policy, etc.) to be taken into consideration. This co-operation may proceed from the representation of employers and workers on various bodies responsible for preventing discrimination, and for the promotion,

<sup>80</sup> See Chapter II, Section 2, para. 106.

<sup>81</sup> Co-operation is broader and more general than the concept of consultation of employers' and workers' organisations prior to decisions concerning new criteria of discrimination and determination of special protective measures provided for in Article 1, paragraph 1(b), and Article 5, paragraph 2, of the Convention; on the scope of the concept of consultation, see ILO, General Survey of the Committee of Experts on the Application of Conventions and Recommendations on tripartite consultation (international labour standards), ILC, 68th Session, 1982, paras. 42-45.

<sup>82</sup> In Australia, the Government states that a special conference of the federal and state Governments, of employers' and workers' organisations and of the other bodies concerned was held in 1986 to consider means of eliminating all unjustified restrictions on the employment of women; see also RCE 1987, Finland: the Finnish Employers' Confederation (STK) and the Employers' Confederation of Service Industries have alleged that the 1986 Equality Act was prepared without the co-operation of the employers' confederations. The Committee recalls that, in accordance with Article 3(a) of the Convention, the Member for which the Convention is in force must undertake to seek the co-operation of employers' and workers' organisations. The obligation laid down in this Article of the Convention should be seen as an obligation regarding means ("undertakes ... to seek") which depend on national circumstances and customs.

application and enforcement of the policy of equality of opportunity and treatment dealt with in Subsection 3 below. Bodies of this kind also provide an opportunity for governments, employers and workers to co-operate with other bodies such as those which represent the interests of certain categories of persons defined by characteristics such as race, colour, sex, religion, etc. or civic organisations for the defence of human rights.

187. Collective agreements are one of the areas where the outcome of the co-operation with employers' and workers' organisations should be clearly apparent when it comes to applying national policy. As the Recommendation states, the parties should ensure "that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment".<sup>83</sup> In Peru, the Ministry of Labour is entrusted with encouraging the parties to take part in collective bargaining "by facilitating conciliation, mediation and arbitration and the institution of standards and procedures for resolving labour disputes so as to guarantee equality of treatment and of assistance".<sup>84</sup> Some collective agreements have clauses stipulating that sex, race, political opinion, religious beliefs or trade union membership may not be taken into consideration.<sup>85</sup> In Tunisia, the Government has stated in its report that all collective agreements now in force establish the principle of equality between men and women in respect of remuneration and everything connected with conditions of employment. In Belgium, a collective agreement reached in December 1982 within the National Labour Council provides that the recruitment and selection of workers may not involve discrimination based on age, sex, marital status, medical history, nationality, political or philosophical beliefs, membership in a trade union organisation or any other organisation. Some agreements thus include a wider range of grounds of discrimination than those prescribed in Article 1, paragraph 1(a), of the Convention.

188. The degree of protection against discriminatory clauses that might be included in collective agreements or in works agreements

<sup>83</sup> See Recommendation No. 111, Paragraph 2(e).

<sup>84</sup> Section 8 of the Act respecting the organisation of the Ministry of Labour and Social Promotion. See also Sweden, section 7 of the Equality Act of 17 December 1979, as amended in 1985, which provides that collective agreements may establish positive measures conducive to equality at work.

<sup>85</sup> Chad, division 4, para. 2, of the general collective agreement; Gabon, division 6, para. 2, of the provisions common to collective agreements covering different branches of activity; Jamaica, para. 53 of the Kaiser Bauxite agreement of 1 June 1978: "The Company and the Union agree to promote and maintain harmonious relations by: (1) non-discrimination against any employee by reason of nationality, race, religious or political beliefs, non-union or union affiliations or union activities"; Mali, collective agreement for mining companies and undertakings dated 24 May 1985; Togo, interoccupational collective agreement of 1 May 1978.

varies according to the country. Generally, collective agreements may not contain provisions that are less favourable than those laid down in labour laws and regulations and may not contravene legislative provisions or regulations concerning public order. In a number of countries the law provides for collective agreements to be registered with or approved by the competent authority, which makes it possible to keep a check on the legality of the provisions contained therein in so far as the positive law of the country has standards prohibiting discrimination. In Swaziland, the Labour Court may refuse to register a collective agreement which entails discrimination based on one of the grounds set out in sections 29 and 35 of the 1980 Employment Act (race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status).<sup>86</sup> In many countries, legislative provisions make it possible to extend the effects of a collective agreement, which originally bound only the employers and workers represented by the parties which had negotiated it, to all employers and workers in a particular branch of activity or a certain region, or to both.<sup>87</sup> In order to be extended, the collective agreements must contain provisions on equality of opportunity and treatment<sup>88</sup> or on equality of remuneration.<sup>89</sup> It is sometimes specified that parties to negotiations must act fairly and without discrimination<sup>90</sup> and they may incur liability if they do not do so. In many countries the law stipulates that provisions in individual and collective agreements that would result in establishing

<sup>86</sup> S. 44(f) of the Industrial Relations Act, 1980.

<sup>87</sup> This extension procedure is prescribed, for example, in laws in Argentina, Austria, Belgium, Benin, Bolivia, Brazil, Burkina Faso, Cameroon, Ecuador, Ethiopia, France, Gabon, Federal Republic of Germany, Ghana, Guinea, Italy, Luxembourg, Madagascar, Mali, Mauritania, Mexico, Morocco, the Netherlands, Niger, Portugal, Peru, Senegal, Sierra Leone, Switzerland, Tunisia, Zaire, etc.

<sup>88</sup> See, for example, France, s. L.133-5 of the Labour Code, LS 1981-Fr. 1. The branch agreement must contain provisions relating, inter alia, to exercise by employees of the right to organise and of freedom of opinion, to the methods of application of the principle of equality of remuneration, to methods of special training for handicapped persons, to occupational equality between men and women and, where inequality is noted, measures for remedying this, to equality of treatment between French and foreign employees, especially as regards employment, to conditions for implementing the right to work of all handicapped persons capable of working, in particular by applying the employment obligation laid down in the Code, to special conditions of work for pregnant women or nursing mothers, etc.

<sup>89</sup> See General Survey of 1986 on equal remuneration, paras. 226 et seq.

<sup>90</sup> See Canada, section 136.1 of the Canadian Labour Code: "A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit". See note 94 below in respect of this duty of fair representation.

discrimination are null and void.<sup>91</sup> In some cases the nullity is extended to works rules which have not always been negotiated.<sup>92</sup> In France, the Labour Code stipulates that the internal rules of an undertaking may not include provisions that are prejudicial to employees in their work on the grounds of their sex, habits, family situation, origin, opinions or beliefs or handicap.<sup>93</sup> In some countries the importance of the joint contribution of the parties to the collective negotiation of agreements free from discrimination has

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<sup>91</sup> See, for example, Spain, s. 17(1) of the Workers' Charter cited above; Ireland, s. 10 of the Employment Equality Act, 1977, cited above; Sweden, s. 8 of the Act of 1979, cited above; USSR, s. 5 of the Labour Code, LS 1971-USSR 1. In the Philippines, the Government states that the provisions of collective agreements which terminate a woman employee's contract of employment upon her marriage are automatically null and void.

<sup>92</sup> See, for example, Italy, s. 19 of the Employment Equality Act, No. 903, cited above; Luxembourg, s. 3.1 of the 1981 Act respecting equal treatment for men and women, cited above, provides that equal treatment must be ensured, inter alia, in collective agreements, individual contracts of employment and the internal rules of undertakings, and s. 6 provides that any stipulation, whether laid down by agreement or contained in regulations or conditions of employment, is automatically null and void if it conflicts with the principle of equal treatment.

<sup>93</sup> S. L.122-35(2). The internal rules of an undertaking must be submitted to the labour inspector, who may demand the withdrawal or modification of provisions therein that are contrary to laws and regulations. The inspector's decision is subject to approval by the administrative judge, who has the authority to censure rules which, even though they may be legitimate in principle, appear excessive by virtue of their scope. A clause in the internal rules of Air France, establishing a retirement age of 50 for female cabin staff only, was annulled on the grounds of illegal discrimination (Council of State, 6 Feb. 1982, Dlle Baudet). The dismissal of a woman employee for having married a colleague contrary to a clause in the internal rules stipulating that both spouses in a married couple may not be employed in the undertaking at the same time was deemed to be lacking in real foundation and serious justification. The Court of Appeal ruled that employees are not required to observe an illicit clause in internal rules, even if they were aware of it when taking up employment, and that freedom to marry may not be impeded by an employer save in very exceptional cases where service requirements make this absolutely essential (Cour de Cassation, Chambre sociale, 10 June 1982, Bull. V, No. 392, p. 291). See also Guinea, s. 135 of the Labour Code of 1988 makes the disciplinary power of the head of an undertaking subject to supervision by the labour magistrate. "At the employee's request, the court shall annul the penalty which was imposed because ... the offence with which the employee was charged ... is not employment-related ...". The burden is on the employer to produce evidence and the employee is given the benefit of the doubt (s. 138).



raised the issue of the liability of the signatory organisations to agreements that introduce or maintain discriminatory practices.<sup>94</sup> Under some provisions, it is a discriminatory or unfair practice for an employers' organisation and/or a workers' organisation to establish or pursue a policy or practice or to enter into an agreement affecting conditions of employment that deprives an individual or a class of individuals of any employment opportunities on prohibited grounds.<sup>95</sup>

189. It is apparent from the information available that the influence of laws and regulations on equality has in many cases helped to eliminate provisions establishing direct discrimination that were included in collective agreements. In Austria, a study by the Ministry of Labour on the effects of the Equality Act has shown the extent to which the provisions establishing discrimination in employment between men and women have been eliminated from collective

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<sup>94</sup> In the United States, referring to the duty of fair representation of unions in respect of their members (cf. Steel v. Louisville and Nashville Railway Co. 323 US 192 (1944)) and to s. 703(c) of the 1964 Civil Rights Act, the Court of Appeal of the District of Columbia, in a case of racial discrimination, ruled that "A union's duty, in representing its members and protecting them from insidious treatment, must certainly be broader than simply refusing to sign overtly discriminatory agreements"; Macklin v. Spector Freight System, Inc., 478 F.2d 979 (US Court of Appeals, District of Columbia, 1973)). See also the ruling handed down in Myers v. Gilman Paper Corp., 14 FEP Cases 218 (US Court of Appeals, 5th Circuit); the Court of Appeals considered that, in view of the fact that the (indirect) racial discrimination stemmed from a negotiated rule, the responsibility of the trade union organisations was involved. Consequently, the unions were held liable for the payment of half the compensation paid to the persons discriminated against, the amount due being shared out among the unions according to the number of their members in the undertaking. The Court also allowed that the federation to which a local union was affiliated was jointly liable with the latter by virtue of the federation's supervision of the negotiations and its obligatory participation in all local agreements. See also United Kingdom: the Employment Appeal Tribunal allowed the principle of the possibility of taking legal action against a union on the basis of section 42(1) of the 1975 Sex Discrimination Act which deals with aiding unlawful acts ((1978) 2 All E.R. 504 (Employment Appeal Tribunal)).

<sup>95</sup> Canada, s. 10 of the Canadian Human Rights Act; Zimbabwe, s. 9(c) of the Labour Relations Act of 1984 whereby "a trade union or a workers' committee commits an unfair labour practice if by act or omission it ... fails to represent an employee's interests with respect to any violation of his rights under this Act", together with ss. 5 (protection of employees against discrimination based on race, tribe, place of origin, political opinion, colour, religious beliefs and sex), 6 (protection of employees' right to fair labour standards) and 7 (protection of employees' right to democracy in the workplace). Such behaviour is liable to be penalised under s. 134 of the 1984 Act.

## EQUALITY IN EMPLOYMENT AND OCCUPATION

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agreements.<sup>96</sup> But the latter may also contain provisions which, though seemingly neutral, result in indirect discrimination against women or members of disadvantaged groups.<sup>97</sup> A study undertaken in France has shed light on two positive points: clauses on occupational equality have been introduced into most new agreements and certain provisions which had discriminatory effects have been removed. The conclusion of the study, however, recalled that in using and sometimes supplementing provisions of the Labour Code in fields such as the right to organise, representative staff institutions, annual leave and the consequences of compulsory national service on the contract of employment, collective agreements have served as "information transmitters" - though they have not yet done so in respect of occupational equality.<sup>98</sup> In Sweden, an initial agreement on equality reached in 1977 between the Swedish Employers' Confederation (SAF), the Swedish Trade Union Confederation (LO) and the Federation of Salaried Employees in Industry and Services (PTK) was revised in the light of the Equality Act in 1983. The Equal Opportunities Agreement of 3 March 1983 includes among its aims equality of opportunity between men and women at work.<sup>99</sup> Several branch agreements are based largely on this general agreement. The measures adopted to promote equality are part of a series of other measures and machinery aimed at obstacles outside the labour market but which prevent women and members of disadvantaged groups from having access to it or which keep them in subordinate positions. In this connection, to appreciate the extent of the policy of equality of opportunity and treatment that has been undertaken, mention should be made of the role played in this policy by parental leave, measures in respect of child minding and

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<sup>96</sup> Ministry of Labour: "Aspects of women's employment in Austria" (Vienna, undated); in the report (for the period 1985-87) due in respect of the Equal Remuneration Convention, 1951 (No. 100), the Government states that most of the differences noted in 1978 have been eliminated and that the Committee on Equality of Treatment is to examine the remaining differences.

<sup>97</sup> For example, jobs that are largely considered to be "men's jobs" or "women's jobs"; jobs which are mainly held by women and which do not lead to any other position in the undertaking, thus precluding any promotion; promotion systems based on length and diversity of experience in the undertaking although women and members of disadvantaged minorities are confined to a single department, etc.

<sup>98</sup> Report of the Government under article 22 of the ILO Constitution.

<sup>99</sup> These agreements are framework agreements establishing the measures that should be taken in each undertaking in pursuit of the aim of equality between the sexes; all forms of discrimination must be combated and to this end the agreements provide for the devising and setting up of a personnel management policy guaranteeing fair conditions of recruitment and vocational training for both men and women; planning in respect of the organisation of work and working environment so as to eliminate obstacles to equality in employment; machinery for evaluating the measures in force so as to be able to pursue the equality policy on a permanent basis.

child care and the reform of curricula. In Norway, the Confederation of Trade Unions in Norway (LO) and the Norwegian Employers' Confederation (NAF) have reached a framework agreement providing that all workers, without distinction based on sex, shall have equal opportunity in respect of employment and training. They are to enjoy equal treatment in respect of recruitment, remuneration, retraining and promotion. Following this agreement, local employers' and workers' organisations reached agreements making provision for action programmes. In Italy, at 1 June 1987, 26 national collective agreements covering 7,803,400 employees, of whom 3,187,050 were women, included clauses providing for affirmative action to remedy past discrimination and to promote equality of opportunity between men and women. In several sectors of activity (commerce, textiles) provision has been made for joint committees to experiment with affirmative action programmes and to see whether the projects negotiated at the level of the undertaking correspond to the criteria set out in the collective agreement.<sup>100</sup>

190. Application of the principle of equality and implementation of programmes involving affirmative measures in the undertaking have in some countries led to the adoption of measures conferring a specific competence in this area on the bodies which represent the staff. In the Netherlands the works councils maintain a general watch to prevent discrimination in the undertaking and to promote equality of treatment between men and women.<sup>101</sup> In China, under new regulations adopted by the All-China Federation of Trade Unions, all local trade unions are to form women's committees (as a part of the trade union committees) to fight sexual discrimination and to protect women's rights.<sup>102</sup> The objective of these committees is to secure the same treatment for women as for men in education, employment and family role and to encourage women to play a more active part in social affairs. In France employers must submit a written report to the works council or, where there is no works council, to the employees' representatives on the comparative situation of general conditions of employment and training for men and women in the undertaking. This report, which may be modified to take account of the views of the works council, is then passed on to the labour inspectorate and made available to any employee upon request.<sup>103</sup>

<sup>100</sup> See M. Chiesi: "Equality of opportunity between men and women: The case of Italy", in Trade union information, Commission of the European Communities, Brussels, 1987.

<sup>101</sup> S. 28(3) of the Works Councils Act, LS 1979-Neth. 1.

<sup>102</sup> ILO: Social and Labour Bulletin, 2/86, p. 349.

<sup>103</sup> S. L.432-3-1 of the Labour Code (Act No. 83-635 of 13 July 1983). The report comprises a study in figures for the assessment, in each of the occupational categories of the undertaking, of the respective situation of women and men as regards recruitment, training, promotion, qualification, grading, working conditions and actual remuneration. It reviews the measures taken during the past year with a view to ensuring equality in employment, and the goals envisaged for the coming year, and contains a qualitative and

(footnote continued on next page)

State financial assistance is provided in certain cases in the form of an occupational equality contract.<sup>104</sup>

191. In several countries collective bargaining in the undertaking has led to the adoption of affirmative action plans or programmes whose general characteristics are similar to those of the programmes implemented in the public service.<sup>105</sup> In some countries these programmes can be negotiated between the parties or imposed by the courts following complaints lodged by workers' organisations<sup>106</sup> or by the bodies responsible for applying the policy of equality.<sup>107</sup> In the latter case co-operation with employers' and workers' organisations will sometimes be very limited or even non-existent. The harmonising and reconciling of two bodies of laws

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(footnote continued from previous page)

quantitative definition of the measures to be taken for this purpose and an evaluation of their cost. Where measures envisaged in the previous report or requested by the committee have not been implemented, the report gives the reasons therefore.

<sup>104</sup> S. 18 of the Act of 13 July 1983 (uncodified), implemented by Decree No. 84-69 of 30 January 1984. This financial assistance seems to have mainly concerned large undertakings. The Minister of Social Affairs has introduced, on an experimental basis, a type of assistance that is better adapted to small and medium-sized enterprises in the form of a contract on equality between men and women in employment between the employer, the State and the persons concerned (Circular CF4-87 of 27 July 1987 to implement the Equality in Employment Act - new provisions for small and medium-sized enterprises and industries).

<sup>105</sup> See above, Section 2, Subsection 1.

<sup>106</sup> United States: Affirmative action programme of American Telephone and Telegraph. The Equal Employment Opportunity Commission, taking advantage of an application for an increase in rates made by the company to the Federal Communications Commission, asked for an investigation to be carried out into the discriminatory practices of the company. Following the investigation, the company undertook to implement certain measures under three consent decrees and their annexes, which were approved by the court, giving them force of law. See Equal Employment Opportunity Commission: A Unique Competence - A Study of Equal Employment Opportunity in the Bell System, report presented to the Federal Communications Commission, Washington, 1972; P.A. Wallace, ed.: Equal employment opportunity and the AT and T case (Cambridge, Mass. 1976); the decrees and their annexes are reproduced in the latter publication.

<sup>107</sup> Australia; United States: Affirmative action programme negotiated between iron and steel companies and the United Steelworkers of America. An initial decree was agreed to by nine iron and steel companies, the United Steelworkers of America (AFL-CIO), the Equal Employment Opportunity Commission, the Department of Justice and the Department of Labour. It was approved by the court, giving it force of law. A second decree is similar in status to that of the AT and T case, the union not having consented to it.

and traditions which differ considerably - on the one hand, labour legislation and bargaining between employers and workers and, on the other hand, general anti-discrimination legislation whose application is a matter for government agencies - will come about only through co-operation with employers' and workers' organisations. Consequently the Committee considers that particular attention should be given to the arrangements for the participation of employers' and workers' organisations in the deliberations of the government agencies and bodies set up to ensure the promotion, application and supervision of policies for equality of opportunity and treatment.

192. To the extent that employers' and workers' organisations have a major role in negotiating measures to promote equality, the question arises of the place and role in the trade unions of women members and members from disadvantaged groups. As regards women, obstacles to their participation in the activities of workers' organisations are well known: the lack of child-minding services, difficulties resulting from the timing of meetings for mothers - or fathers - who assume the burden of family responsibilities, lack of confidence in their capacities on the part of persons who have not yet been able to exercise these capacities, sexist attitudes on the part of certain male trade unionists, social stereotypes in respect of women and their domestic responsibilities all combine to impede their participation. Some unions have adopted policies and practices with a view to strengthening the position of women in the unions. In the United Kingdom the Trades Union Congress has issued a guide on affirmative action programmes dealing with programmes within trade union structures. The Swedish Union of Clerical and Technical Employees in Industry has, since 1981, adopted a programme to promote equality for the period up to 1987. Following a survey on the promotion of equal opportunities promotion carried out among 63 branch unions, a working programme for the promotion and evaluation of equality of opportunity was presented to the Union's Congress. The Australian Council of Trade Unions has published a training manual on affirmative action which states that if inequality in the unions is to be got rid of, a policy of equality will have to be followed and there will have to be willingness to take action. The following measures are suggested: evaluation of the number of women members and of women's participation at the various levels of representation and trade union management; examination of internal structures to pinpoint obstacles to broader female participation in trade union activities; remedial action (extra seats reserved for women on the executive bodies of sectors in which their participation is weak compared with that of the number of women members, setting up of women's committees or committees on equality of treatment with direct access to decision-making bodies, recruitment of women for permanent trade union positions, verification during elections that the list of candidates reflects the structure of the organisation's members); "positive discrimination" in favour of women for participation in trade union training courses; inclusion of questions of equality of opportunity and treatment in trade union courses. Furthermore the unions should make sure that their own employment practices are not discriminatory and organise their activities, meetings and training courses at times likely to suit women. At the international level,

the programme of action of the International Confederation of Free Trade Unions (ICFTU) for the integration of women in trade unions was launched following the Fourth World Conference on Women organised by the ICFTU in April 1985. The programme makes provision for positive measures that should strengthen women's position in trade unions.

### Subsection 3: Means of promotion and enforcement

#### A. General machinery for prevention, application and supervision

##### Administrative structures

193. Most governments indicated in their reports that the application and supervision of the principles of non-discrimination and equality of opportunity and treatment fall under the competence of labour authorities such as the Ministry of Labour, the employment office<sup>108</sup> and the labour inspection service.<sup>109</sup> Specifically, as regards the labour inspectorate, the supervision of the application of provisions concerning equal treatment is usually entrusted to inspectors who are generally responsible for ensuring the observance of labour legislation.<sup>110</sup> Elsewhere, supervisory tasks are assigned to specialised services within the labour inspectorate.<sup>111</sup> These inspectors often enjoy broad powers as regards access to premises and

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<sup>108</sup> As regards the role of placement officers in the promotion of equality of opportunity and treatment see above, Chapter II, Section 2, paras. 93-94.

<sup>109</sup> The governments of the following countries made special mention of the role played by the Ministry of Labour and/or other ministries, the Labour Commissioner, the labour inspectorate, the employment office and the labour office: Algeria, Angola, Antigua and Barbuda, Austria, Belize, Bolivia, Brazil, Burkina Faso, Chad, Colombia, Comoros, Costa Rica, Republic of Côte d'Ivoire, Cuba, Egypt, Equatorial Guinea, Guatemala, Guinea, Iraq, Kuwait, Madagascar, Malaysia, Mexico, Mozambique, Nepal, Niger, Norway, Qatar, Rwanda, Saudi Arabia, Senegal, Seychelles, Syrian Arab Republic, Togo, Tunisia, Venezuela, Zambia.

<sup>110</sup> In France labour inspectors are responsible for monitoring the application of the Labour Code, including provisions inserted into the Code by the Act of July 1983 on occupational equality. They are also competent to investigate alleged infractions of s. 416 of the Penal Code.

<sup>111</sup> In Belgium, for example, in accordance with the Act of 4 August 1978 on economic reform (Title V) and orders issued under it, supervisory responsibilities as regards employees are entrusted, among others, to the inspectors of the labour office, the employment office and the occupational safety office, while the same responsibilities as regards self-employed workers are entrusted to a separate service.

the inspection of files.<sup>112</sup> The actions of labour inspectors within the framework of their supervisory function run the risk of being completely ineffective if employers and workers are not fully aware of their reciprocal rights and obligations and, especially if they are not convinced of the usefulness of applicable legislation. For this reason, Article 3, paragraph 1(b) of the Labour Inspection Convention, 1947 (No. 81), and Article 6, paragraph 1(b) of the Labour Inspection (Agriculture) Convention, 1969 (No. 129) provide that the labour inspection system shall "supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions". The advice and information furnished by labour inspectors is often aimed at informing employers and workers of the existence of legal provisions in force, providing explanations on their meaning and scope, and suggesting the best way of giving effect to these provisions. The supervisory and advisory functions reinforce and complement each other to the extent that both tend to promote the effective application of legal provisions for the protection of workers. It is thus especially important that labour inspectors be properly trained as regards questions concerning equality of opportunity and treatment, and be well versed in the corresponding provisions, so that they may offer pertinent advice and information in this area. Nevertheless, the Committee must note that very little information was received from governments on the specific action of labour inspectors in the effective application of provisions concerning equality. This lack of information on the role of labour inspectors and their efforts to obtain the observance of provisions concerning equality may be explained, in part, as the Committee has already noted in previous General Surveys, by the lack of human and physical resources needed to maintain suitable inspection

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<sup>112</sup> In Cameroon, for example, the labour inspector may order the medical examination of women and children with a view to ascertaining that the work allotted to them is not beyond their strength (Act No. 74-14 of 17 November 1974 instituting the Labour Code, LS 1974-Cam. 1, s. 94). In India, as regards equal pay between men and women, the Government may appoint inspectors having investigative powers (access to the workplace, examination of documents, questioning of the staff); the Government may also appoint agents responsible for hearing and deciding complaints concerning contraventions of the law, as well as claims arising out of non-payment of wages at equal rates to men and women workers (Act No. 25 of 1976, ss. 7 and 9, LS 1976-Ind. 1). In Luxembourg, the labour inspector may freely, and without prior notice, enter any establishment or worksite falling under the jurisdiction of the labour inspectorate, question employers and staff, examine accounts, records, files and documents. In its report, the Government of Tunisia stressed the responsibility of the labour inspectorate as regards protection against discriminatory actions, within the framework of its general function of supervising the application of labour legislation; it referred specifically to the labour inspectorate's power to inspect records in cases of dismissal.



services.<sup>113</sup> Many inspection services are overworked, or lack qualified, trained and experienced staff to handle questions of equality and discrimination in employment and occupation. In this connection, the Committee notes that certain governments have taken initiatives with a view to reinforcing the action of the labour inspectorate, by training inspectors in matters concerning equality, recruiting specialised staff, and strengthening the participation of workers' representatives in the process of inspection. In particular, it notes that certain countries have adopted texts which expressly call for a co-ordination between the labour inspectorate and specialised agencies responsible for questions of equality.<sup>114</sup> In Italy, regional commissions may undertake investigations within enterprises to verify that the principles of equality between men and women, established by the Act of 1977 on equality, are being observed; in carrying out this task the regional commissions collaborate with the labour inspection services.<sup>115</sup> In addition to problems concerning the functioning of the labour inspectorate, there is also the question of its competence in cases regarding equality of treatment in employment, and especially in access to training and education; for this reason, it is useful to establish specialised agencies to monitor the application of the principles of Convention No. 111 in these particular areas.

194. Where there are specialised agencies to deal with questions of equal treatment, the Committee considers that measures to co-ordinate the work of these agencies and that of the labour administration, the public placement offices and the labour inspectorate should be given full consideration. It would seem appropriate to ensure co-ordination between agencies dealing at the national or regional level and the labour inspectorate, which acts at the level of the enterprise. Policies aimed at promoting equal opportunity and treatment in employment and occupation are usually made at the national level, but they are applied within the enterprise, among other places. Moreover, co-ordination between specialised agencies and authorities responsible for training and education may well contribute to a better understanding and more judicious application of the principles laid down in the Convention.

<sup>113</sup> See the 1985 General Survey on Labour Inspection, and the General Survey of 1986 on equal remuneration.

<sup>114</sup> In Greece, equal treatment legislation (Act No. 1414 of 30 January 1984, s. 8(2), LS 1984-Gre. 1) calls for sex equality offices to be set up in all the labour inspection services to supervise the Act's application. In Portugal, the labour inspectorate which is responsible for enforcing the Legislative Decree guaranteeing equality of opportunity and treatment for men and women in employment and occupation, must first obtain the opinion of the Committee on Equality in Work and Employment before the drafting of its report, whenever there are reasonable questions concerning the existence of discriminatory situations or practices (Legislative Decree No. 392-79 of 20 September 1979, s. 18).

<sup>115</sup> Act No. 56 of 28 February 1987 on the organisation of the labour market.

Bodies for the representation of staff

195. Trade unions, workers' representatives and works councils, as well as joint advisory committees, must play a role in the application and promotion of equal opportunity and treatment.<sup>116</sup>

<sup>116</sup> In the Federal Republic of Germany, workers' representatives have the right of co-determination in matters concerning recruitment and promotions, and participate in preparing personnel forms and in decisions concerning dismissals; they thus play an important role in the application of the principles of the Convention. In Belgium, the works councils must be informed annually of the composition of staff by sex, age bracket and occupational category, of the general development of employment within the enterprise, and especially of the causes for voluntary departure, retirement, and individual or collective dismissals, broken down according to the same criteria; moreover, they receive information concerning vocational training and staff policies, which enables them to monitor the enterprise's activities as regards recruitment, selection, transfers and promotions. In France, the employer is required to submit to the works council an annual report comparing the situation of men and women within the enterprise. Trade union representatives are provided with copies of the report, which contains, on the one hand, a quantitative comparative analysis of the situation of men and women workers, by occupational category, within the enterprise, and on the other hand, information which enables the trade union to take stock of measures aimed at ensuring occupational equality, meeting pre-established objectives, defining quantitative and qualitative measures to be undertaken in this connection, and evaluating their cost. Moreover, the employer is required to seek the opinion of the works council. The report is forwarded to the labour inspectorate, along with the works council's comments. Works councils in the Netherlands, pursuant to the Act on works councils, must seek to prevent all discrimination in the enterprise, and in particular to encourage equal treatment between men and women (RCE 1983, p. 221). The Government of Tunisia has stated that the joint advisory committees, which are elected in enterprises employing 20 or more workers, have special responsibilities as regards training, promotions and other aspects of the worker's career. In the USSR, many tasks are entrusted to the trade unions with a view to supervising and promoting equal treatment. They are responsible, in the first place, for ensuring the full observance of pertinent legislation and regulations, in particular by supervising the technical and legal aspects of work; thus, at their request, even senior administrators may be relieved of their duties in the event of serious infractions of labour legislation. Trade unions also participate in the drafting of legislation concerning women. They play a direct role in the preparation of development plans, which include measures to improve the situation of women workers. Their rights are also brought to bear on regulations. The enterprise's trade union committee, acting on behalf of workers and in accordance with their instructions, concludes

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The Committee considers that a greater awareness on the part of workers' representatives concerning problems of equal opportunity and treatment within the framework of their general mission of representing the interests of workers, coupled with a more effective use of information concerning equal opportunity and treatment, would tend to provide a favourable impetus to the implementation of the right to equality.<sup>117</sup> In this context, the collaboration of workers' representatives with the labour inspectorate, with a view to reinforcing the efforts of the latter, would acquire its full meaning.

B. Specialised bodies to promote, enforce and supervise equality and prevent discrimination

196. Paragraph 4 of Recommendation No. 111 stipulates that appropriate agencies, assisted where practicable by advisory committees composed of representatives of employers' and workers' organisations, and other interested bodies, should be established for the purpose of promoting application of national policy of non-discrimination in all fields of public and private employment. These agencies should be able to take all practicable measures to foster public understanding and acceptance of the principles of non-discrimination; they should receive, examine and investigate complaints that the national policy to promote equality of opportunity

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a collective agreement with management every year. All collective agreements are required to contain a special chapter devoted to "the conditions of work and life for women workers, and allowances for the education of children". The trade union committee must also consider the question of vocational training and further training of women workers (A. Biryukova, "The role of the Soviet woman in the decision-making in trade union committees and in industry", in Labour and Society, Sept. 1985, pp. 307-321). Moreover, within the Presidium of the Central Council of Trade Unions, there are social affairs committees which deal with questions of life and work for women and the protection of maternity and children. They are responsible for finding solutions to the socio-economic problems facing working women, such as the improvement of occupational qualifications, the creation of safe and healthy conditions of work, social security and allowances for the education of children. The Government of the Syrian Arab Republic referred in its report to the role of trade union committees in the application of legal provisions.

<sup>117</sup> The Committee recalled, in connection with the adoption of Act No. 609 of 1986 concerning equality between men and women in Finland, that in accordance with Article 3(a) of the Convention, a Member for which the Convention is in force shall undertake to seek the co-operation of employers' and workers' organisations in promoting acceptance and observance of the national policy designed to promote equality of opportunity and treatment; the Committee expressed the hope that such a co-operation would preside over future activities (RCE 1987, pp. 359-360).

and treatment is not being observed and, if necessary, by conciliation, secure the correction of any practices regarded as being in conflict with the policy; and consider further any complaints which cannot be effectively settled by conciliation and render opinions or issue decisions concerning the manner in which discriminatory practices revealed should be corrected. The Committee also notes that the International Labour Conference, in the resolution it adopted at its 71st Session,<sup>118</sup> advocated the establishment of national tripartite machinery on the status of women workers and the strengthening of national equal opportunity bodies to stimulate action aimed at promoting equality of opportunity and treatment for women in economic and social life.

197. Since the last General Survey on the instruments under discussion, a growing number of countries have set up specialised structures to promote and apply the principles and policy of non-discrimination and equality of opportunity and treatment. These structures vary considerably as to the way in which they have been established, the area they cover, their composition, competence and functions. With all their diversity,<sup>119</sup> they all reveal a growing awareness of the problems of discrimination in employment and occupation and the use and need of individual structures to better identify and cope with the problems involved.

198. Many specialised bodies had been set up under legal provisions, for instance within the framework of legislation on either racial equality or equality between men and women.<sup>120</sup> Others have

<sup>118</sup> Resolution on equal opportunities and equal treatment for men and women in employment, ILC, 71st Session, 1985.

<sup>119</sup> Such diversity bears witness to the possibilities of adapting the Convention to national circumstances and practices.

<sup>120</sup> Australia: Human Rights and Equal Opportunity Commission, Human Rights and Equal Opportunity Act, 1986; Austria: Equality of Treatment Committee, Equality of Treatment Act of 23 February 1979, as amended on 27 June 1985 and Federal Order of 14 October 1987; Canada: Canadian Human Rights Commission, Canadian Human Rights Act; Denmark: Danish Equality Council, Equality between the Sexes Act (No. 161) of 12 April 1978, LS 1978-Dan. 3; Spain: the Women's Institute Act (No. 16) of 1983; United States: Equal Employment Opportunity Commission, Civil Rights Act of 1964, Title VII; Finland: Equality Ombudsman and the Equality Board, Act on equality between men and women (No. 609) of 14 August 1986; France: National Occupational Equality Council, Equality in Employment Act (No. 83-635 of 13 July 1983, SL 1983-Fr. 2); Greece: Sex Equality Section under the Ministry of Labour and the National Labour Council, Act No. 1414 of 13 January 1984 respecting the application of the principle of equality of the sexes in employment relationships, LS 1984-Gr. 1; Ireland: Employment Equality Agency, Employment Equality Act (No. 116) of 1 June 1977, LS 1977-Ire. 1; Iceland: Equal Status Council, Act No. 65 of 1985 on the equal status and equal rights of women and men; Norway: Equality of Opportunity Ombudsman and Committee, Equality between the Sexes Act (No. 45) of 9 June 1978, LS 1978-Nor. 1; New  
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been established by decree or regulations.<sup>121</sup> However, these bodies are sometimes set up by ministerial decision, especially when they operate at the level of one or more ministries.<sup>122</sup> When a specialised agency is established under an order of the executive authorities, it is able, if need be, to adjust quickly to new conditions; however, if it is set up under legislation, it has the advantage of being more independent and established on a more permanent basis. What is more, since powers to enact and supervise legislation and national policy on equality of opportunity and treatment are often conferred upon bodies established by law, their scope for action is accordingly strengthened.

199. Some specialised agencies operate at the governmental or ministerial level: for instance, in several countries, competent ministries have been set up for specific population groups<sup>123</sup> or ministers have been appointed especially to deal with equality issues.<sup>124</sup> By setting up a Ministry or appointing a Minister with

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Zealand: Race Relations Conciliator, Race Relations Act (No. 150) of 1971, LS 1971-NZ 1, Human Rights Commission, Act No. 49 of 1977; Netherlands: Equality of Opportunity Committee, Equality Act (No. 86) of 1980, LS 1980-Neth. 2, and Equal Pay Act (No. 129) of 1975, LS 1975-Neth. 1; Equality of Opportunity Committee (Civil Service), Act concerning equal treatment of men and women (civil service), 1980; Portugal: Committee on Equality in Work and Employment, Legislative Decree No. 392/79, LS 1979-Por. 3; United Kingdom: the Commission for Racial Equality, Race Relations Act, 1976, LS 1976-UK 2, Equal Opportunities Commission, Sex Discrimination Act, 1975, LS 1975-UK 1; Sweden: Equal Opportunities Ombudsman and Committee, Act of 17 December 1979 concerning equality between men and women at work, LS 1979-Sw. 2, Ombudsman and Committee entrusted with the application of Ethnic Discrimination Act (No. 442) of 1986.

<sup>121</sup> This is the case, for example, in Belgium where the Committee on Women's Work was set up by a Royal Decree.

<sup>122</sup> For example, in Belgium, the Ministerial Committee for the Status of Women was set up by order of the Council of Ministers in 1980; in Cyprus, the Committee on the status of women was set up in 1979 by an order of the Council of Ministers; in Italy, the National Committee entrusted with the elimination of obstacles, even indirect, that might limit equality between men and women, was set up by Ministerial Decree in 1983; and the Federal Committee for issues concerning women was established in Switzerland by an order of the Federal Council in 1976.

<sup>123</sup> For example, Australia: Ministerial Department of Ethnic Affairs, Ministerial Department of Aboriginal Affairs; Bangladesh: Ministry on the Status of Women's Affairs; Burundi: Ministry on the Status of Women; Chad: Ministry for the Promotion of Women and Social Affairs; New Zealand: Ministry of Women's Affairs, Ministry of Maori Affairs; Senegal: Secretary of State for Women's Affairs; Sri Lanka: Ministry of Women's Affairs.

<sup>124</sup> Sweden: Minister for Issues of Equality between Men and Women attached to the Ministry of Labour.

authority to promote equality of opportunity and treatment of various population groups, it is possible to identify and resolve problems at a high political level where decisions are more likely to be implemented and applied.

200. In some cases, specialised agencies form part of the administration, such as a department, division, board or service under the general supervision of a Ministry,<sup>125</sup> or operate at the inter-ministerial level.<sup>126</sup> Since these agencies are incorporated into governmental or administrative structures, they benefit from the administrative facilities and means these structures possess.

201. Many specialised agencies have the status of a committee, commission or advisory council under various ministries or legislative bodies.<sup>127</sup> The International Labour Conference has considered that such bodies should be placed at a level that enables them effectively to monitor achievements and, where necessary, to influence or stimulate the initiation of relevant programmes in other parts of the government administration.<sup>128</sup>

<sup>125</sup> For example, Antigua and Barbuda: Women's Desk; Argentina: Directorate for Women's Issues; Australia: Office of the Status of Women; Bangladesh: Women's Department; Canada: Department of Indian Affairs and Northern Development; Dominican Republic: Women's Bureau; Ecuador: National Women's Board; Egypt: General Department for Women's Affairs; Equatorial Guinea: Department for the Promotion of Women; Finland: Delegation on Equality Issues; Greece: General Secretariat for Equality of Sexes and Offices for Equality; Haiti: Women's Board; India: Women's Welfare and Development Bureau; Jamaica: Bureau of Women's Affairs; Japan: Bureau of Women's Affairs; Jordan: Department for Women and Child Care; Netherlands: Bureau for the Prevention of Racial Discrimination; Nicaragua: Women's Bureau; Niger: Board for the Promotion of Women; Panama: Women's Bureau; Philippines: Bureau of Women and Minors, Office on Muslim Affairs, Offices for the Northern and Southern Cultural Communities; Poland: Bureau of Plenipotentiary in charge of women's affairs; Sri Lanka: Women's Bureau; Switzerland: Bureaux of Women's Affairs under the federal administration and cantons of Geneva and Jura; Togo: General Directorate for the Promotion of Women; Trinidad and Tobago: Division of Women's Affairs, Government Community Development Division; United States: Bureau of Indian Affairs; Venezuela: National Women's Bureau, Central Bureau of Indigenous Affairs.

<sup>126</sup> For example, Cyprus: Committee on Women's Affairs.

<sup>127</sup> For example, Egypt: National Commission for Women in Egypt; Norway: Equality of Opportunity Council; Philippines: National Commission on the Role of Filipino Women; Trinidad and Tobago: National Commission on the Status of Women; Tunisia: Committee on Women's Work; USSR: Standing Commissions dealing with women's working and living conditions under the two houses of the Supreme Soviet, the Council of the Union and the Council of Nationalities.

<sup>128</sup> Above-mentioned resolution on equal opportunities and equal treatment for men and women in employment, ILC, 71st Session, 1985.

202. Some specialised agencies are collegial bodies made up of members who are often chosen by the executive authorities but enjoy independence under the law; some of them report to the legislative bodies on a regular basis. These are mostly specialised bodies with powers to enact and supervise provisions and principles of equality of opportunity and treatment. Examples of this type of agency include the Human Rights and Equal Opportunities Commission in Australia, the Human Rights Commission in Canada,<sup>129</sup> the Equal Employment Opportunity Commission in the United States,<sup>130</sup> the Human Rights Commission and Race Relations Conciliator in New Zealand, the Equal Opportunities Commission and the Commission for Racial Equality in the United Kingdom. In countries with a federal structure, specialised bodies have been set up at state level; similar powers to those of bodies at the federal level are often vested in their members, as is the case in Australia,<sup>131</sup> Canada,<sup>132</sup> and the United States.<sup>133</sup>

203. These specialised agencies sometimes include representatives of employers' and workers' organisations.<sup>134</sup> The Committee would

<sup>129</sup> The Commissioners, members of the Canadian Human Rights Commission, are appointed by the Governor in Council; the Chief Commissioner and the Deputy-Chief Commissioner, who are full-term members, have a seven-year term, whereas the other commissioners have a three-year term.

<sup>130</sup> The members of the Equal Employment Opportunity Commission are appointed by the President with the consent of the Senate. In this country the Equal Employment Opportunity Co-ordinating Council is composed of the Secretary of Labor, the Chairperson of the Equal Employment Opportunity Commission, the Attorney-General, the Chairperson of the United States Civil Service Commission and the Chairperson of the United States Civil Rights Commission; see also Norway, the Chairperson or Vice-Chairperson of the Equal Status Appeals Board must be a judge; Iceland, the Equal Status Council is presided over by a jurist who is not appointed by the Government, but by the Supreme Court.

<sup>131</sup> Equal Opportunity Commissions in New South Wales, South Australia, Western Australia and the State of Victoria.

<sup>132</sup> For example, there are Human Rights Commissions in most provinces; widespread machinery has been set up at all levels, both federal and provincial, with varied competences and powers. As regards equality of opportunity between men and women, this machinery usually includes an office for the status of women with ministerial responsibilities, a structure to co-ordinate policies of agencies involved in women's labour problems and advisory councils on the status of women; United Nations, CEDAW/C/5/Add. 16-1983.

<sup>133</sup> For example, Connecticut: Commission on Human Rights and Opportunities; Delaware: State Human Relations Commission; Minnesota: Commissioner of Human Rights.

<sup>134</sup> See for example: Austria, Committee on Women's Employment; Belgium, Commission on Women's Work; Denmark, Equality of Status Council; Ecuador, National Women's Council; France,  
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like to stress once again how important it is that employers' and workers' representatives should participate in the drafting and implementation of equality of treatment and opportunity policies. This not only contributes to placing equality policies in the overall perspective of development and employment policies, but also helps to make workers and employers, as well as their representatives, more aware of problems of discrimination in employment and occupation. In its above-mentioned resolution,<sup>135</sup> the International Labour Conference stated that bodies should provide a mechanism for systematic consultation with employers' and workers' organisations. Some of these bodies also include experts in the field of equality or representatives of the categories of persons to be protected.<sup>136</sup> By co-operating with these agencies, experts on equality can make people more aware and help them have a better grasp of discrimination problems, whilst also providing vital expertise to overcome issues that are often complex.

#### Competence and functions

204. Some specialised agencies have general ratione personae competence;<sup>137</sup> others are responsible for promoting equality of opportunity and treatment of specific population groups such as women,<sup>138</sup> ethnic minorities (including indigenous populations) and religious minorities,<sup>139</sup> the disabled, etc. Other agencies, on the other hand, have general ratione materiae competence covering protection against discrimination in employment and occupation, while still others deal specifically with matters relating to equality of

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Council of Occupational Equality; Departmental Commission for Disabled Workers, Disabled Ex-Servicemen and similar; Israel, Tripartite Public Council; Luxembourg, Committee for Women's Work; Malawi, National Women's Employment Commission; similarly, commissions for equality of status or opportunity in Ireland, the Netherlands, Norway, Portugal and Sweden are made up of employers' and workers' representatives.

<sup>135</sup> See above, para. 196.

<sup>136</sup> For example, in France, the Departmental Commission on Disabled Workers includes both an employers' and a workers' representative as well as a representative of disabled workers; the Committee on Equality in Work and Employment in Portugal includes representatives from the Commission on the Status of Women.

<sup>137</sup> For example, human rights commissions.

<sup>138</sup> For example, commissions on equality between men and women. In its General Survey of 1986 on equal remuneration, the Committee referred to the ILO Directory of Governmental Bodies dealing with Women Workers' Questions, Geneva, 1983, which indicated that over 90 countries had set up administrative bodies dealing with matters affecting women workers.

<sup>139</sup> For example, the minority commissions set up in India, Mexico, Pakistan, Philippines and Yugoslavia.



treatment and opportunity in employment and occupation.<sup>140</sup> Some agencies deal more specifically with public sector employment.<sup>141</sup>

205. While a policy designed to promote equality of opportunity and treatment constitutes a whole, it is essential to achieve diversity in the approaches and measures adopted according to the problems to be solved. In some countries, the variety of measures needed to combat discrimination is reflected in the increasing number of agencies dealing with different aspects of equality of opportunity and treatment in employment and occupation: educational campaigns, particularly for employers and workers, promotional activities, co-ordination of activities of government agencies in matters relating to equality, review of draft legislation and regulations and checking conformity of legislation in force with the principle of equality in employment and occupation, investigation of complaints of discrimination. The wide variety of agencies is also a reflection of the fact that the elimination of discrimination on certain grounds, such as race, sex and religion, calls for special measures. Co-ordination between these bodies as provided for in Paragraph 9 of the Recommendation is one of the aspects which must be seriously envisaged by the national policy referred to in Article 2 of the Convention.

### Consultation and promotion

206. Most of the specialised agencies essentially have consultative and promotional status, and their main functions are to promote equality of treatment and opportunity by carrying out studies, surveys and information activities, by assisting persons who are discriminated against, and by co-operating with or co-ordinating activities of non-governmental or governmental organisations. They are concerned with informing the public on matters relating to equality, mainly by organising seminars, meetings and consultative services, and by publishing periodical reports, studies and bulletins. These agencies may be involved in formulating and implementing preferential or affirmative action policies or participate in special development policies set up for certain population groups who are considered to be disadvantaged. It is not possible within the scope of this Survey to give more than an

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<sup>140</sup> In the United States, for example, the Equal Employment Opportunity Commission is competent to hear and investigate complaints of discrimination in employment procedures and practices; there is also a Civil Rights Commission which can receive complaints of discrimination and is chiefly concerned with evaluating application of civil rights legislation and assessing the situation as regards observance of human rights (United Nations doc. E/CN.4/1987/37, p. 16).

<sup>141</sup> For example, Australia: Equal Opportunity Bureau of the Commonwealth Public Service Board; Canada: Office of Native Employment; Netherlands: Commission for Equality of Opportunity and Treatment in the Public Service; New Zealand: Equal Employment Opportunity Unit of the State Services Commission; United States: Civil Service Commission.

illustrative description of the functions of some of these agencies, to show how they contribute to the implementation of the national policy of equality of opportunity and treatment or of certain aspects of such a policy.

207. As regards equality between men and women, in Belgium, for example, it is the duty of the Commission for the Employment of Women, either at its own initiative or at the request of the Minister of Labour, to render opinions, carry out surveys or submit proposals for legislation or regulations in all matters directly or indirectly involving the work of women;<sup>142</sup> in China, the women's committees set up within the local trade union committees participate in enterprise management, mainly in order to ensure that women are given the same treatment as men in education and employment and as regards their role in the family, and to encourage them to participate more actively in social life. They are involved in formulating and implementing policy and legislation in areas affecting women's interests;<sup>143</sup> among the duties assigned to the General Department for Women's Affairs in Egypt is the formulation of a policy for the development of Egyptian women and of plans and programmes for the protection of women and their integration in development;<sup>144</sup> in Ecuador, the National Council for Women<sup>145</sup> is responsible for proposing policies, co-ordinating activities for the promotion of women in the public and private sectors, supporting the activities of the Women's Bureau, and gathering information on plans and programmes for the promotion of women; in Malawi, the National Committee on Women's Employment has undertaken a study on different aspects of the role of women in society, on topics such as women and employment, women and development and women in agriculture; in Poland, the Office of Plenipotentiary for Women's Affairs is responsible for co-ordinating the activity of all quasi-governmental organisations involved in the advancement of women; it carries out activities aimed at improving the living conditions for women.<sup>146</sup>

208. Some agencies are involved in the promotion and implementation of equal opportunity policies for ethnic minorities, including tribal or indigenous populations. This is the case, for example, in India, where a Minorities Commission was set up in 1978 which, in addition to having powers relating to the application of legislation and the receiving of complaints,<sup>147</sup> has the tasks of carrying out research and surveys and submitting proposals relating to a policy of equality for minorities; this Commission has published reports containing recommendations for the improvement of affirmative action policies in certain areas, including equality of opportunity in education.<sup>148</sup> In Canada, the Indian and Native Affairs Secretariat

<sup>142</sup> Royal Order of 2 December 1974, s. 2.

<sup>143</sup> ILO, Social and Labour Bulletin, 2/1986, p. 349.

<sup>144</sup> United Nations, CEDAW/13/Add.2-1987.

<sup>145</sup> Decision No. 401, 1 April 1987.

<sup>146</sup> CEDAW/A/42/38-1985.

<sup>147</sup> See below, para. 213, note 156.

<sup>148</sup> Fifth Report of the Commission for Scheduled Castes/Scheduled Tribes.

grants resources to Indian organisations and individuals for development projects. In Mexico, responsibility for implementation of indigenous policy lies with the National Institute for Indigenous Affairs, which carries out indigenous community development projects and submits proposals to the Executive with a view to solving problems. In New Zealand, the Maori Economic Development Commission is responsible, inter alia, for identifying and evaluating the cost of positive development proposals for Maoris.<sup>149</sup> In Norway and Sweden, co-ordinating committees have been set up to organise reindeer breeding, with a view to assisting the development of the Sami population. In this country, the ethnic minorities ombudsman is responsible, inter alia, for initiating affirmative measures against ethnic discrimination. In the Philippines, two offices have been set up for the Northern and Southern cultural communities respectively; among the tasks assigned to them is the co-ordination of development programmes and projects for the advancement of these communities. These offices are responsible for co-ordinating the formulation, integration and implementation of development plans aimed at assisting the members of these cultural communities in developing their lands.<sup>150</sup> In this area in particular, promotion of equality taking into account the differences between indigenous peoples and other citizens calls for thorough knowledge of the problems.<sup>151</sup>

209. As regards promotion of equality of religious minorities, the Committee has noted that the Philippines has set up an Office on Muslim Affairs, whose task it is to preserve and develop the culture, traditions and welfare of Moslem Filipinos, fully respecting their beliefs, customs, traditions and institutions; its functions include providing advice and assistance, co-ordinating and initiating development projects, serving as a central agency for assistance, carrying out studies and maintaining centres for ethnographic research and archives.<sup>152</sup>

210. In Malta, a commission has been set up under the Constitution and Act No. XXXI of 1976 to settle cases of discrimination in employment on account of political opinion.

211. Other agencies are concerned with promoting equality of opportunity in the public service: in Australia, for example, the Equal Employment Opportunity Bureau, set up within the Commonwealth Public Service Board to deal with conditions of employment in the public service, is responsible for formulating policy concerning women and groups considered to be disadvantaged in the public service: aborigines, physically disabled persons and migrants. In Canada, the

<sup>149</sup> In this country, co-operation between the Human Rights Commission and the New Zealand Employers' Federation and other groups concerned led to the publication by the Federation in 1985 of a Positive Action Manual on equal opportunity between men and women and different ethnic groups.

<sup>150</sup> Executive Orders Nos. 122-B and 122-C, 1987.

<sup>151</sup> For a thorough examination of administrative arrangements concerning indigenous peoples, see United Nations doc. E/CN.4/Sub.2/1986/7/Add.1, pp. 223 et seq.

<sup>152</sup> Executive Order No. 122-A, 1987.

Office of Native Employment, set up with a view to increasing employment opportunities in the federal administration for Indians, examines recruitment practices hindering indigenous persons' access to employment and carries out publicity and awareness campaigns among natives in an effort to promote careers in the public service. Several consultative bodies have been set up in the federal public service to assist the Government in matters relating to affirmative action. A joint management-union commission on affirmative action and consultative committees have been set up to deal, respectively, with employment in the public service of visible minorities (1985), disabled persons (1978), affirmative action for women (1984 - the chairwoman of the Royal Commission on the Status of Women is a member). A joint management-union commission has been set up (1985) to study the application of the principles of equality of remuneration in the public service. In the United States, the Civil Service Commission is responsible for examining and approving plans for affirmative action programmes submitted to it by departments and agencies, and for supervising the application of such plans; it publishes reports periodically on the state of affairs. In New Zealand, the Equal Employment Opportunity Unit of the State Services Commission is generally concerned with promoting, co-ordinating and pursuing policies, programmes and practices relating to equal employment opportunity in the public service. The State Services Commission set up this unit in 1983 and assigned it the task of applying its policies in recruitment, conditions of employment, career organisation, selection and promotion to ensure that equality of opportunity is not impaired on grounds of race, sex, country of origin, physical disability, marital status or personal convictions.<sup>153</sup>

#### Review and policy formulation

212. Certain specialised agencies are primarily responsible for undertaking a systematic analysis of government policy as regards human rights, including the question of equality of treatment; they examine legislation, regulations and practices in the light of the principles of equality, rendering opinions in this connection; if necessary, they formulate recommendations concerning the amendment of legislation or the adoption of new provisions to strengthen the application of the principles of equality of opportunity and treatment.<sup>154</sup> In Singapore, the President's Council for Minority

<sup>153</sup> United Nations, CEDAW/5/Add.41 - 1987.

<sup>154</sup> See for example, France: the Central Council on Occupational Equality between Men and Women reviews proposed legislation and decrees concerning occupational equality between men and women, as well as texts concerning specific conditions of work linked to the worker's sex (Decree No. 84-136 of 22 January 1984, which supplements the Labour Code pursuant to s. L.330-3, concerning the Central Council on Occupational Equality between Men and Women). In Brazil similar functions are carried out by the National Women's

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Rights, set up pursuant to article 69 of the Constitution, is essentially responsible for bringing to the attention of Parliament any bill which may place persons of any racial or religious community at a disadvantage to another community. In certain cases, specialised agencies may play a pivotal role within the administration by offering local authorities concerned with the principles of equality a means

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Commission (Act No. 7353 of 29 August 1985). In the United States, the Equal Employment Opportunity Co-ordinating Council submits an annual report of its activities to Congress, and makes recommendations for legislative or administrative changes (1964 Civil Rights Act, s. 715). In New Zealand the Human Rights Commission may comment on the impact of legislation or policies envisaged by the Government in the area of human rights. In Portugal the Occupational and Employment Equality Commission may recommend the adoption of legislative, regulatory and administrative provisions with a view to enhancing the application of the Legislative Decree on equal opportunity and treatment (Legislative Decree No. 392/79, s. 15). In the United Kingdom the Commission for Racial Equality is responsible for keeping under review the working of relevant legislation, and for drawing and submitting proposals concerning amendments (Act of 1976 on race relations). In Northern Ireland the Standing Advisory Commission on Human Rights reports to Parliament and evaluates the suitability of current legislation and the extent to which it prevents discrimination based on religious conviction and political opinion, within the framework of the 1976 Act on fair employment practices. Also in the United Kingdom, the Commission for Racial Equality and the Equal Opportunities Commission may establish codes of practice which, in their opinion, tend to eliminate discrimination in employment and promote equality of opportunity among persons of different sexes or belonging to ethnic groups. Codes of this kind were adopted and entered into force in 1984 (race) and 1985 (sex). Proposals to modify current legislation or practices have been issued, for example, by the Employment Equality Agency in Ireland, the Ombudsman in Sweden, and the Human Rights Commission in Canada. The 1983 amendments to the Canadian Human Rights Act reflected a certain number of changes which the Canadian Human Rights Commission had been calling for since its creation. Specifically, these amendments concerned the protection of physically or mentally disabled persons, an expanded definition of sex discrimination, and the explicit recognition of the employer's responsibility for discrimination committed by its employees. The Canadian Human Rights Act was further amended in 1985 at the request of the Commission. The Commission also helped to draft the 1986 Employment Equity Act and approved an ordinance on equal wages which came into force in December 1986. Likewise, the Canadian Commission on the Status of Women has formulated recommendations on measures to be taken to implement equality of opportunity and treatment between men and women, and was thus involved in the initial formulation of a vast framework of legislative provisions which were adopted in this connection. See also the General Survey of 1986 on equal remuneration, para. 117.

for influencing the central government's policy, and thus applying Paragraph 3(b) of the Recommendation in the other direction.<sup>155</sup>

#### Implementation and supervision

213. In addition to promoting, proposing or examining legislative provisions, some specialised agencies are responsible for the application and supervision of the principles of equality in employment and occupation.<sup>156</sup> Since its last General Survey, the Committee has noted that agencies responsible for examining complaints and monitoring the implementation of anti-discriminatory provisions have been created in a number of countries, in particular to guarantee equality of opportunity and treatment between men and women. Some of these agencies may receive and initiate complaints (for example, Australia, Canada,

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<sup>155</sup> See, for example, United Kingdom: Local authorities in London requested the Equal Opportunity Commission to urge the Government to abandon its plans to prevent local authorities from encouraging contractors to recruit greater numbers of women. The Government is opposed to the use of public contracts by local authorities to promote equality of opportunity for women, Blacks and ethnic minorities, and insists that decisions be taken exclusively on the basis of commercial considerations. Although s. 71 of the 1976 Race Relations Act stipulates that local authorities are required to promote good relations between the races, there is no similar obligation in the Act of 1975 concerning sex discrimination, as modified by the Act of 1986. In a letter addressed to the Equal Opportunity Commission, the Association of Local Authorities of London insistently requested that the Sex Discrimination Act be amended so as to require generally that local authorities promote equality between the sexes (ALA urges changes in Sex Discrimination Act, The Law Society's Gazette, 13 January 1988).

<sup>156</sup> See, for example, India: The monitoring commissions established pursuant to the 1976 Act concerning the abolition of bonded labour are primarily responsible for advising the authorities on the application of this Act, for monitoring infractions of the Act, and for recommending appropriate measures in response to such infractions. The Commission also provides legal assistance in proceedings concerning bonded labour. The Indian Minorities Commission established in 1978 is responsible for evaluating the effectiveness of a number of guarantees laid down in the Constitution and in national and state legislation for the protection of minorities; for making recommendations with a view to ensuring the effective application and enforcement of all relevant legislation and guarantees; for evaluating the application of national and state policies regarding minorities; for examining specific complaints concerning the violation of minority rights and guarantees; for undertaking studies, research and analyses on the elimination of discrimination against minorities; for recommending suitable legal and social measures which the national or state governments may take in the interest of minorities; for collecting information on the situation of minorities, and for submitting regular reports to the Government.

New Zealand, United States); others are authorised to undertake investigations and issue opinions in response to complaints filed by persons alleging discrimination (for example, the Netherlands), or to receive and forward such complaints to the competent authorities (for example, Spain); still others are empowered to undertake investigations at their own initiative, rather than dealing with individual complaints (for example, Ireland, Portugal, United Kingdom), or issue opinions (for example, Austria). In certain countries both an Equality Commissioner (Ombud/Ombudsman) and a commission on equality are responsible for the implementation and supervision of legislation concerning equality between men and women (Finland, Norway, Sweden).<sup>157</sup> In one of these countries, namely Sweden, recent legislation has established a two-year pilot programme pursuant to which an ombud/ombudsman and a commission monitor the implementation of the Act against ethnic discrimination.<sup>158</sup>

214. The procedures followed by specialised agencies which are responsible for receiving and investigating complaints vary from one country to another; in general, however, they proceed by means of inquiries and conciliation; where this is of no avail, they are sometimes authorised to resort to coercive measures by initiating action in court.<sup>159</sup> Certain specialised agencies are competent to

<sup>157</sup> In Finland s. 16 of Act 609 of 1986, Act No. 610 of 1986 and Regulation 739 of 1986 provide for an ombud/ombudsman and a commission. In Norway Act No. 45 of 1978 and Directives issued in March 1978 provide for an ombud/ombudsman and an appeals commission. In Sweden Act No. 412 of 1980 and Directives Nos. 415 and 416 of 1980 provide for an ombud/ombudsman and an equal opportunity commission.

<sup>158</sup> Act No. 442 of 1986.

<sup>159</sup> In Australia the Human Rights and Equal Opportunity Commission (created pursuant to Act No. 125 of 1986) which is responsible, inter alia, for guaranteeing Australia's observance of obligations arising from the Convention, may conduct inquiries at the request of the Commissioner, or in response to a complaint, or on its own initiative; it may seek to resolve the matter or effect settlement by conciliation, or present recommendations to prevent the discriminatory act or practice from being repeated, and require the payment of compensation or otherwise remedy the damages in question. In Canada the federal Human Rights Commission holds similar powers as regards investigation and conciliation; where these do not suffice, it may appoint a Human Rights Tribunal. Such tribunals may recommend or order the correction of situations arising from discriminatory practices, grant the rights which have been refused, set up affirmative action programmes, indemnify the victim for lost wages and expenses, and order the payment of damages (between July 1984 and December 1986 the Commission received 1,094 complaints, 80 per cent of which concerned employment). Likewise, in New Zealand, in cases where the Human Rights Commission's efforts at conciliation have failed, the matter may be brought before an equal opportunity tribunal. In the United States, the Equal Employment Opportunity Commission may attempt conciliation independently or in response to a complaint, or

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refer the matter to the courts. In Portugal the Occupational and Employment Equality Commission may inspect workplaces, request information from all public or private entities and issue opinions as regards equality, especially when so requested by occupational organisations and the agency responsible for procedures of conciliation; it may make public proven cases of violation of provisions concerning equality. In the United Kingdom the Race Equality and Equal Opportunity Commissions may undertake investigations concerning discriminatory acts or practices at their own initiative or at the request of the Secretary of State. They may order changes in practices or procedures and issue non-discrimination notices concerning discriminatory practices with a view to ending or modifying such practices. If such notices are breached within a period of five years, or if other cases of discrimination persist, the courts may issue a restraining order addressed to the persons responsible to respect the law. In Ireland the Employment Equality Agency has similar powers. Although these agencies are not authorised to receive individual complaints, they may provide assistance to persons wishing to exercise their right to file suit when the case at hand raises a question of principle, or when the complainant cannot reasonably be expected to take the necessary steps without assistance. In the Netherlands, when investigations undertaken by the Equality Commission point to the existence of sex discrimination, the Commission so informs the competent ministries as well as the person responsible for the discrimination; it may also notify employers' and workers' organisations (above-mentioned Act of 1 March 1980). In Spain the Institute for Women's Affairs is responsible for receiving and forwarding to the competent authorities complaints presented by women concerning specific cases of sex discrimination in fact or in law (Act No. 16 of 1983 concerning the creation of the autonomous Institute for Women's Affairs). In Japan an Equal Opportunity Mediation Commission, established in each prefectural Women's and Young Workers' Office may conduct mediation and formulate a proposal for mediation, and recommend its acceptance by the parties concerned (Act No. 45 of 1 June 1985 concerning the adjustment of legislation to promote the guarantee of equal opportunity and treatment in employment between men and women, ss. 16 to 21, LS 1985-Jap. 1). In Austria the Commission for Equality of Treatment may, on its own initiative or at the request of occupational organisations, issue an opinion on questions concerning equality between men and women; it may also examine individual cases to ascertain compliance with the principle of equality, and request the employer to submit a report and prepare proposals aimed at putting an end to such discrimination. At its own initiative, or upon request, it may examine individual cases as regards the violation of statutory provisions on equality. Where the complainant's request contains sufficient evidence (s. 6 of the Act of 1985), the Commission may request the employer to submit a report. In the event of the employer's failure to reply, any occupational organisation may bring the case before a labour court. The Commission may publish in the Ministry of Labour's bulletin details concerning any judgement involving infractions of the principle of equality. In Finland, Norway and

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examine the application of anti-discriminatory provisions in the public sector: indeed, certain agencies have been instituted especially for this purpose,<sup>160</sup> while others are competent at once for the public and private sectors.<sup>161</sup> As a general rule, nothing that has been said or done during the conciliation proceedings may be used as evidence in subsequent proceedings. In addition to protecting the parties, such a situation also facilitates conciliation: parties to a dispute are unlikely to engage in constructive negotiation if there is a possibility that their arguments may be presented as evidence during a subsequent inquiry or hearing.<sup>162</sup>

## The effectiveness of specialised bodies

215. The effectiveness of specialised agencies in promoting and enforcing guarantees for equal treatment depends, in particular, on the

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Sweden, an ombud/ombudsman and an equality commission are responsible for implementing and supervising legislation on equality between men and women; the systems vary slightly from one country to another. In Sweden the ombud/ombudsman may enjoin the employer, under penalty of a fine, to furnish the required information, and may file suit in an ordinary court of law to obtain payment of such fines (Act No. 216 of 1985, s. 2).

<sup>160</sup> See, for example, Belgium: the Advisory Commission for disputes concerning equality of treatment in the public service (Royal Order of 2 March 1984), when so requested by the competent jurisdiction, is responsible for giving opinions on disputes concerning the application of provisions of equality of treatment in the public service; it is also responsible for forestalling disputes through appropriate means (opinions, studies, proposals); United States: the Civil Service Commission is responsible for applying provisions concerning non-discrimination in the federal civil service, by means of suitable reparations, including the reinstatement or recruitment of an official, with or without payment of lost wages; Netherlands: the Commission for Equality between Men and Women in the Public Service may undertake investigations and report instances of discrimination to the authorities and to staff representatives.

<sup>161</sup> See, for example, Canada: at the federal level, the Human Rights Commission examines complaints presented by public servants alleging discrimination under the Human Rights Act; this function was exercised by the Public Service Commission until 1985. Norway: the ombud/ombudsman and the Equality Commission are responsible for the private and public sectors.

<sup>162</sup> Pursuant to the Canadian Human Rights Act, the investigation and conciliation must be conducted by different individuals; Australia (Victoria): nothing which has been said or done during the course of negotiations carried out by the Equality Commissioner engaged in an investigation or attempt at conciliation may be used as evidence in proceedings before the Commission (Victoria, 1984 Equal Opportunity Act, s. 42). United States: the disclosure of such information may be subject to criminal sanctions, according to the 1964 Civil Rights Act, s. 706.

scope of these guarantees under national legislation and on the powers assigned to these agencies; specifically, the effectiveness of commissions responsible for supervising the application of provisions concerning equality depends not only on their powers of investigation and conciliation, but also on the extent to which they may enforce compliance with their recommendations, either by referring the matter to courts, or by the binding nature of their decisions. The effectiveness of these specialised agencies also depends upon the human and financial resources available to them for the discharge of their responsibilities, for without adequate resources, their functions remain hypothetical and their actions hampered. The International Labour Conference emphasised in its above-mentioned 1985 resolution that agencies responsible for ensuring equality of opportunity should be sufficiently well staffed to carry out their tasks.<sup>163</sup>

#### Subsection 4. Remedial procedures

216. The application of a policy of equality of opportunity and treatment in employment and occupation depends partly on the appeal procedures available in the event of allegations of discrimination. It is important to remember, however, that complaints concerning individual situations should be considered as symptoms or indications that can lead to the detection of practices of exclusion or differential treatment applied in general to a group of persons with identical characteristics. Resort to a complaint or legal action by the person discriminated against cannot be considered to be sufficient in itself to guarantee equality of opportunity and treatment. It entails risks in relation to the objective of equality in so far as an unsuccessful legal action can hold up the development and progress of this equality for several years and thus delay recognition of new concepts of a general or abstract principle. Moreover, in many cases individual action will not be considered justified where the facts involve indirect or systemic discrimination against the member of a group by virtue of membership in that group. Means of appeal vary according to the industrial relations systems or the laws of the country. Normally the complainant may go before the competent courts or, in some countries, as already stated, specialised bodies which have powers of inquiry and conciliation for dealing with complaints of discrimination;<sup>164</sup> where the person concerned works in an undertaking he or she may, in an appropriate case, exhaust the possibilities of internal grievance procedures,<sup>165</sup> refer the matter to the labour

<sup>163</sup> As set forth in paragraph 13(a) of the above-cited 1985 resolution.

<sup>164</sup> See above paras. 213-214.

<sup>165</sup> Workers in the private sector who allege discrimination in employment and occupation may first of all appeal to the internal settlement procedures, calling upon their representatives where appropriate or requesting their trade union to defend their rights vis-à-vis the employer. In France, for example, employees' delegates may submit individual claims to the employer concerning the

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inspectorate, which often has powers of investigation or conciliation,<sup>166</sup> or take the case to the competent bodies in respect of individual labour litigation. Traditionally, the bodies called upon to give rulings on alleged cases of discrimination have been the ordinary, civil<sup>167</sup> or penal courts; sometimes the civil courts have a special panel for labour cases,<sup>168</sup> but in many countries the laws and regulations now confer competence on more specialised bodies: labour tribunals, industrial courts, etc.<sup>169</sup> Sometimes the complainant has several possibilities of appeal procedures depending upon the nature of the complaint.<sup>170</sup> In some countries, individual disputes concerning the application of provisions on equality of

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application of laws and collective agreements in the undertaking. In some countries a worker who considers he or she has been discriminated against can challenge the employer's decision under a procedure for the examination of grievances. Recourse to this type of procedure is frequently provided for in collective agreements in Canada and in the United States. In the latter country, where in a vast number of undertakings no collective agreement applies, voluntary complaints procedures have sometimes been set up.

<sup>166</sup> See above, paras. 193-194, on the subject of the powers of investigation of the labour inspectorate and its competence to ensure compliance with labour legislation.

<sup>167</sup> For example, Jordan, s. 26 of the Labour Code of 1960 (LS 1960-Jor. 1), as amended in 1972.

<sup>168</sup> In Greece, in cases concerning equality of treatment between men and women involving sums below a particular level, the case is brought before the judge of a civil court which serves as a labour tribunal, and appeals are brought before the civil court of the first instance; where larger amounts are involved, the case is brought before the civil court which serves as a labour tribunal, and appeals are brought before the court of appeal. In Italy also, complaints concerning equality of treatment between men and women are heard, in accordance with an expedited special procedure, by a magistrate acting as the judge of a labour court, and appeals are brought before the court of the second instance sitting as a labour court.

<sup>169</sup> In some French-speaking countries of Africa, in particular, the Labour Code provides that individual labour disputes may be brought before the competent labour tribunal; for example: Madagascar, s. 130 of the Labour Code of 1975, LS 1975-Mad. 1; Mali, s. 241 of the Labour Code of 1962, LS 1962-Mali 1; this however is not the case in the Federal Republic of Germany, or in the United Kingdom under s. 54 of the Race Relations Act.

<sup>170</sup> Thus, for example, in Belgium in cases of equality of treatment between men and women the person who considers himself or herself to be the victim of discrimination may take civil action before a labour tribunal, penal action before a criminal court on certain grounds, which are listed exhaustively and, in the case of an appeal against refusal of admission to vocational training, the law has made provision for an expedited complaints procedure before the civil courts.

treatment are taken before special bodies comprising representatives of workers and of employers who try to settle the dispute by conciliation.<sup>171</sup> Sometimes a labour tribunal that has been seised of a case refers the dispute to a specialised body for settlement or inquiry.<sup>172</sup> In one country which has ratified the Convention, a person who alleges that there has been discrimination in recruitment for the public service based on religion, race, sex, caste or tribe may submit a petition to the Supreme Court.<sup>173</sup>

217. In the public service, appeals procedures may entail the intervention of a joint body<sup>174</sup> or of a specialised body on equality issues which sometimes is also a joint body. The proceedings often take place before the courts or bodies which in general are responsible for legal enforcement in the public service.<sup>175</sup>

218. Whatever the machinery set up, affording remedies for the harm suffered runs into certain problems relating in particular to the often excessive slowness of the procedure, to difficulties connected

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<sup>171</sup> For example: industrial tribunals ("conseils de prud'hommes") in France and Luxembourg; in the latter country, cases involving private employers are brought before an arbitration tribunal which is also made up of representatives of both parties; USSR works' labour disputes committees; the decision of one of these committees may be appealed to the competent local works' or factory trade union; it is also possible to appeal directly to the district people's court. In Japan, if the efforts of the mediation committee fail to produce a result, the dispute may be brought before the courts as a civil case. In Somalia, a worker who considers himself or herself to have been discriminated against in employment may bring the matter before the joint committee of his or her undertaking or a ministerial committee made up of representatives of management, the trade unions, the Youth Union and the Women's Union.

<sup>172</sup> In Ireland, for example, the labour court examines cases in the initial stage and decides whether to appeal to an industrial relations officer or to an equality officer for investigation and recommendation.

<sup>173</sup> Nepal, information furnished by the Government.

<sup>174</sup> In France, joint administrative committees, made up of an equal number of representatives of the administration and of the staff, are consulted on individual decisions affecting members of the civil service; the Central Council for the Public Service, which is also a joint body, is the final body for appeals in cases of discipline or promotion; its competence embraces all general matters concerning the state public service.

<sup>175</sup> For example: administrative tribunals in France, Greece and Italy (appeal to the Council of State); Council of State, Disputes Committee in Luxembourg; in the Federal Republic of Germany, disputes concerning employees - "Beamte" - in the public service are heard by administrative bodies and those concerning employees and workers - "Angestellte", "Arbeiter" - are heard by labour courts; Peru, a public service court is responsible for dealing in the last instance with individual complaints by public servants as regards the application of administrative laws and regulations.

with the burden of proof, the fear of initiating proceedings alone and that of exposure to reprisals, and the possibility for the employer of discharging a breach by simply paying compensation. The institution of accelerated procedures, which are cheap and easily accessible, involving the settlement of the dispute by conciliation, to remedy acts of discrimination in employment and occupation, is an important element in the application of the policy to promote equality of opportunity and treatment in employment and occupation. This need is felt particularly in cases of discrimination in recruitment and even more so as regards access to education and vocational training for, in such cases, it must be possible for the rights of the person who has been discriminated against to be restored quickly to enable him or her to enter a particular job competition, for example, or the training course in which he or she wanted to participate.<sup>176</sup> Specialised bodies may be the most suitable way of ensuring the application of the principle of equality of opportunity and treatment.

## Exercise of rights of complaint

219. As a rule it is the person who considers himself or herself discriminated against and who wishes to seek redress that is personally responsible for exercising his or her right of appeal. As the Committee noted in previous General Surveys,<sup>177</sup> it should be possible for proceedings to be set in motion other than by the filing of a complaint by an individual worker. Lodging a general complaint covering a number of workers makes it easier to assume the burden of proof, probably reduces the risk of reprisals, obliges the employer to find valid arguments to defend his or her position and is thus also likely to serve as a deterrent to discriminatory action.

220. The legislation of many countries provides for trade union organisations to institute proceedings on equal treatment on behalf of their members, whether the action is brought before a court or a specialised body.<sup>178</sup> In most cases a trade union must be duly

<sup>176</sup> As the Committee stated above, para. 211, in Belgium a special expedited procedure has been set up for the examination of cases of alleged discrimination in respect of access to training.

<sup>177</sup> General Surveys on equal remuneration of 1975, para. 73, and 1986, para. 171.

<sup>178</sup> e.g. Australia (s. 50 of the Sex Discrimination Act, 1984); Austria (ss. 5 and 6 of the Equality of Treatment Act, 1979); Belgium (s. 132 of the Economic Reform Act, 1978 (LS 1978-Bel. 2) provides that representative organisations of workers and employers may, for the purpose of defending their members' rights, be parties to any disputes arising out of the Act); Brazil (ss. 513 and 839 of Legislative Decree No. 5452 to approve the consolidation of labour laws (LS 1985-Bra. 1)); Jordan (s. 26 of the 1960 Labour Code, as amended in 1972); Sweden (s. 4 of Act No. 371 of 1974); Zimbabwe (s. 9 of the Labour Relations Act, 1984, provides that a trade union or a workers' committee commits an unfair labour practice if it fails to represent an employee's interests with respect to any violation of his or her rights under the Act or under a valid collective bargaining agreement).

authorised to act on a worker's behalf. In certain cases, however, it may take legal action without prior authorisation from the person concerned,<sup>179</sup> though the latter may sometimes object.<sup>180</sup> In certain cases the alleged victim of discrimination cannot take legal action individually if he or she is a member of a trade union, unless the trade union itself fails to initiate such action.<sup>181</sup> In one country, proceedings to ensure compliance with the legal provisions prohibiting discrimination in offers of employment or in the procedures followed for the purpose of filling a vacancy may be instituted by bodies corporate enjoying full legal capacity whose work includes promoting the interests of persons who would be entitled to lodge complaints.<sup>182</sup>

221. In some countries class actions may be brought in order to arrive at a decision affecting all the workers in the category that is being subjected to discrimination. Use of this procedure has been

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<sup>179</sup> In Belgium, for example, the workers' representative organisations have capacity to bring proceedings based on decrees giving binding effect to collective decisions or agreements, on the application and performance of collective agreements and on the rights conferred on members of the organisation by collective employment agreements. The organisations are granted an independent power to defend the rights of their members who need not therefore authorise them to do so (s. 4 of the Act of 5 December 1968 respecting collective industrial agreements and joint committees (LS 1968-Bel. 1)). This does not however affect the right of the members to bring an action individually on their own behalf, or to take part in the proceedings (Act of 4 August 1978, cited above).

<sup>180</sup> In France, for example, organisations or groups which are capable of suing and being sued and whose members are bound by a collective labour agreement may bring all actions arising out of the agreement on behalf of their members, without having to prove that they have special authority from the member concerned, on condition that such member has been informed and has not objected. The member concerned may however intervene at any time in the proceedings instituted by the organisation or group. The latter may at any time intervene in the proceedings on the ground of the collective interest of its members in the settlement of the dispute. A trade union may in any court of law exercise all the rights of a civil plaintiff in respect of matters directly or indirectly affecting the collective interests of the occupation that it represents (ss. L.135-4 and L.411-11 of the Labour Code (LS 1981-Fr. 1)).

<sup>181</sup> In Sweden, if a trade union is empowered to institute proceedings before a labour court on behalf of any person who is or has been a member of the organisation (Ch. 4, s. 5 of Act No. 371 of 1974, as amended (LS 1977-Swe. 3)), the person concerned or the ombud/ombudsman is not entitled to do so unless the organisation itself fails to take action.

<sup>182</sup> Netherlands, s. 3(2) of the Act of 1 March 1980 (LS 1980-Neth. 2).

instituted in the United States, where class actions may be brought under Title VII of the Civil Rights Act of 1964. These actions may be brought, however, only under certain conditions relating to the number of persons involved, the common nature of the questions of law or fact and of the defences, and the risk of inconsistent judgements in the event of separate actions being brought.<sup>183</sup> Similar conditions apply to the lodging of class actions in Australia.<sup>184</sup> Class actions are also recognised in the legislation of New Zealand,<sup>185</sup> in

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<sup>183</sup> Actions may be maintained as class actions under Title VII of the Civil Rights Act of 1964, subject to Rule 23(a) of the Federal Rules of Civil Procedure which permits class action only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defences of the representative parties are typical of the claims or defences of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition to the above four requirements, three other conditions must also be taken into consideration: (1) separate actions would create a risk of inconsistent adjudications or adjudications which would substantially impair the ability of non-parties to protect their interests; (2) where injunctive relief is sought, the party opposing the class has acted or refused to act on grounds generally applicable to the class; (3) questions of law or fact common to the members of the class predominate over questions affecting only individual members, and class action is the superior method for fairly and efficiently adjudicating the controversy. Class actions are also permitted under the Equal Pay Act, 1963, but they are governed by the "opt-in" provision: an employee must specifically give consent in writing to become a party plaintiff (Bureau of National Affairs: Fair Employment Practices Manual, pp. 431:225 and pp. 431:525).

<sup>184</sup> S. 50(1)(c) of the Sex Discrimination Act 1984 provides that a complaint may be lodged with the Human Rights Commission by a person or persons included in a class of persons aggrieved by an unlawful act, on behalf of the persons included in that class of persons. In considering whether a complaint was made in good faith, the Commission must satisfy itself, inter alia, that the class of persons concerned is so numerous that joinder of all its members is impracticable, that there are questions of law or fact that are common to all members of the class, that the claims of the complainant are typical of the claims of the class and that multiple complaints would be likely to produce varying determinations that could have incompatible or inconsistent results for the individual members of the class (s. 70(2)(a)). Even if these conditions are not met, the Commission may decide that the justice of the case demands that the matter be dealt with and a remedy provided by means of a representative complaint.

<sup>185</sup> S. 38 of the Human Rights Commission Act 1977 empowers the Commission to bring proceedings on behalf of a class of persons and to seek remedies on behalf of persons who belong to the class.

the legislation or practice of Canada<sup>186</sup> or in case law as, for example, in India with respect to equal remuneration.<sup>187</sup>

222. In some countries the legislation on equal treatment empowers the body responsible for enforcement of the law to bring legal action on behalf of the complainants on its own initiative. The specialised body may bring before the courts any disputes that it has not been possible to settle by conciliation.<sup>188</sup> It must be borne in mind, moreover, that the labour inspectorate, which has general responsibility for ensuring the enforcement of labour laws and regulations, is sometimes empowered to bring an action before the courts<sup>189</sup> or the public prosecutor's office.<sup>190</sup> The possibility for an alleged victim of discrimination to be represented by a trade union, together with class actions or actions brought on their own

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<sup>186</sup> While no provision is made under the Canadian Human Rights Act for class actions as such, complaints filed jointly or separately by more than one individual or group may be dealt with together if the Human Rights Commission is satisfied that they involve substantially the same issues of fact and law (s. 32(4)). In the province of Quebec the Code of Civil Procedure which applies to the Quebec Charter of Human Rights and Freedoms provides for class actions.

<sup>187</sup> On the basis of established jurisprudence, any interest group or special group in India can bring litigation in court seeking enforcement of the right of women to equal remuneration for work of equal value.

<sup>188</sup> In Canada, for example, the Human Rights Commission may request the President of the Human Rights Tribunal Panel to appoint a single Human Rights Tribunal if it is satisfied that the examination of the complaint is justified. In the United States, if the Equal Employment Opportunities Commission is unable to resolve a complaint submitted under Title VII of the Civil Rights Act of 1964 by means of conciliation, it may sue the person against whom the complaint is directed. In Iceland, the Equal Status Council is empowered to initiate legal proceedings if its proposals for redress in respect of a violation of the provisions concerning equality are not accepted. In New Zealand, the Race Relations Conciliator of the Human Rights Commission may bring proceedings before the Equal Opportunities Tribunal in the event of the failure of the conciliation procedure. In Sweden, the ombud/ombudsman may initiate proceedings with the labour court on behalf of the alleged victims of discrimination if a settlement out of court proves impossible and if the ombud/ombudsman considers that a ruling on the dispute is important for the enforcement of the law.

<sup>189</sup> For example, Cyprus (Factories Law, 1956, s. 92(1)); Ghana (Labour Decree, s. 48(e)); Factories, Offices and Shops Act, s. 73); Kenya (Employment Act, s. 50); Malawi (Labour Legislation Act (various provisions), s. 4); Pakistan (Factories Act, s. 74); Singapore (Factories Act, s. 75(1)).

<sup>190</sup> For example, Benin (Labour Code, s. 140); Comoros (Labour Code, s. 163); Gabon (Labour Code, s. 147); Japan (s. 102 of the Labour Standard Law 1947 authorises labour inspectors to exercise the power of a judicial police officer); Mali (Labour Code, s. 352).



initiative by the authorities in the public interest - the application of legislation with respect to equality being considered a matter of public interest - may be an additional means of applying the policy of equality of opportunity and treatment.

### Financial assistance

223. The prospect of incurring significant financial costs may deter a person who has been victimised by discrimination from seeking relief. The cost of proceedings can well be prohibitive for a person who does not enjoy the benefit of financial assistance, legal aid or the backing of a trade union. For this reason, a number of countries stipulate that complainants are entitled to assistance during the course of proceedings instituted to exercise their rights.<sup>191</sup> In a certain number of countries, labour legislation provides that all proceedings concerning labour disputes shall be free of charge.<sup>192</sup>

### Burden of proof

224. One of the most important procedural problems that arises when a person alleges that there has been discrimination in employment or occupation is connected with the fact that the burden of proving the discrimination underlying the act complained of lies with the complainant, which may represent an insurmountable obstacle as regards affording remedies for the harm suffered. While at times the evidence can be collected without undue difficulty (in the case, for example, of advertisements for job vacancies where the discrimination is obvious), more often the discrimination involves an action or activity that is suspected rather than established and difficult to prove, particularly in the case of indirect or systemic discrimination, and more so when the information and records that might constitute evidence is generally held by the person being accused of discrimination. This is why in some countries the legislation or jurisprudence has sometimes reversed the legal burden of proof or at least introduced some degree of flexibility as regards the burden of

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<sup>191</sup> In Australia assistance in meeting the costs of an inquiry by the Human Rights Commission, or of proceedings in the federal court, is available to complainants as well as to persons accused of an offence under the terms of the Act of 1984 on sex discrimination (ss. 83 and 84); in Italy, as regards disputes concerning relations between employers and workers in the service of the State, poor persons whose claims are not obviously unfounded are entitled to legal aid at the expense of the State (Act No. 533 on the settlement of individual labour disputes and disputes concerning compulsory social insurance and assistance (LS 1973-It. 1)); in Spain, art. 24.2 of the Constitution establishes the right of each person to legal aid.

<sup>192</sup> For example, Mexico, (s. 685 of the Decree dated 30 December 1979 amending the Federal Labour Code (LS 1979-Mex. 1)); Senegal, s. 210 of Act No. 80-01 of 22 January 1980 repealing and replacing sections of the Labour Code, and adding sections to said Code (LS 1980-Sen. 1)).

proof being on the complainant. The Government of Canada has emphasised<sup>193</sup> that the courts and other competent authorities must demonstrate flexibility as regards the admissibility of evidence. It has stated that, as regards human rights cases, it will suffice to show that the balance of the probability is either in favour of the respondent or the complainant; in practical terms, this means that if the respondent is unable to provide a satisfactory answer to the complaint, then discrimination can be reasonably inferred.<sup>194</sup> In some countries the person alleging discrimination must first of all demonstrate that inequality of opportunity or treatment coincides with inequality in respect of race, sex, religion, political opinion, trade union activity, etc. Once this has been established, the burden of proof then shifts to the employer to show that he or she had a legitimate reason that was not discriminatory.<sup>195</sup> In cases where

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<sup>193</sup> Report under article 22 of the Constitution for the period ending 30 June 1986.

<sup>194</sup> In respect of the legislation of one Canadian province, the Committee noted (RCE 1984, p. 257 and RCE 1986, p. 264) that the 1979 Human Rights Code in British Columbia, whereby no employer or employment agency could discriminate on any grounds whatsoever against a person in respect of employment or a condition of employment, unless reasonable cause existed for such discrimination, was amended in 1984; the Committee noted that the 1984 Act, by eliminating the necessity of proving the existence of reasonable cause, places on the person alleging discrimination, and on this person alone, the burden of proving that it is based on one of the grounds listed in the Act. The Committee requested the Government to furnish information on the practical application of the Act.

<sup>195</sup> In the Federal Republic of Germany, the 1980 Equality Act reversed the previous situation by providing that "where ... the worker establishes facts that afford grounds for assuming that discrimination has occurred on account of his or her sex, the employer shall bear the burden of proving that material reasons unrelated to a particular sex justify differential treatment"; see also RCE 1982, p. 151. In the United States, the application and interpretation of Title VII of the 1964 Civil Rights Act by the courts have resulted in an elaborate jurisprudence, particularly as regards proof. In cases of alleged discrimination in hiring on grounds of race, the minority group member must first make out a prima facie case. Thus, for example, he or she must show that he or she belongs to a particular applicant pool, that he or she had the qualifications for the position, that his or her application was rejected, that the position remained open and that the employer kept looking for applicants with similar qualifications. The employer may rebut this evidence by showing that he or she had "a legitimate, non-discriminatory reason" for his or her action. The complainant may then attempt to show that the supposedly legitimate reason for the action was a pretext for the employer's actual discriminatory motive. In cases of indirect discrimination, courts have held that employment practices which are not discriminatory at first sight may violate Title VII if the effect

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workers having exercised their right to file a claim regarding equality of treatment are dismissed or find their conditions of work changed, the legislation in certain countries provides that it is incumbent on the employer to produce evidence that the submission of the claim was not the sole or main reason for the dismissal or the change in the employee's conditions of work.<sup>196</sup> The requirement that it is the person charged with having committed a discriminatory act who must produce evidence that the reason for the measure taken is unrelated to the complaint gives extra protection to the person discriminated against and may also have a dissuasive effect.

225. The Committee considers that the question of the burden of proof is of fundamental importance in any allegation of discrimination.

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of the practice is to discriminate against a minority group and the practice is not related to job performance. Thus there is considered to be discrimination where a practice adversely affects minorities to a significant degree more than Whites, and the practice is not job-related or justified by business necessity. The Supreme Court has found that an employment test which disqualified more than twice as many Blacks as Whites violated Title VII because the test was not related to job performance. (*Griggs v Duke Power Co.*, 401 US 424 (1971); *Albemarle v Moody*, 422 US 405 (1975)). In cases of discrimination in employment on the basis of sex, the courts have adopted a similar jurisprudence as regards proof. Furthermore, the courts have held that the bona fide occupational qualification exception is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex" (*Dothard v Rawlinson*, 433 US 321, 329-30, 334 (1977)). In *France*, as regards equality of remuneration, the burden is on the employer to provide the judge with evidence likely to justify the inequality; the employee has the benefit of the doubt (Labour Code, s. L 140-8; Act No. 83-625 of 13 July 1983; LS 1983-Fr. 2). Likewise, in *Jamaica* the burden is on the employer to prove that he or she has applied the principle of equal pay for equal work (Employment (Equal Pay for Men and Women) Act, No. 34, 1975, s. 7). In *Finland* and *Sweden*, the complainant must prove that he or she had the best qualifications and the employer must prove that his or her preference or the unequal treatment had nothing to do with the person's sex.

<sup>196</sup> In *Belgium*, no employer employing a worker who has filed a complaint (at the level of the undertaking, the labour inspectorate or the courts) may terminate that worker's employment relationship or modify his or her conditions of employment, unless for reasons not related to the complaint. The burden of proving such reasons is on the employer (s. 136 of the Act of 4 August 1978) if the worker is dismissed or his or her conditions of employment are modified within 12 months following the filing of a complaint or, where a court action has been brought, for up to three months after the judgement has become final. In *Portugal*, in the absence of proof to the contrary, it is deemed unlawful to punish a woman worker within one year of her having alleged discrimination (Legislative Decree No. 392-79, s. 11).

A person who has been discriminated against will often hesitate to take his or her case to the competent body, not only from fear of reprisals<sup>197</sup> but also because most of the time he or she does not have all the evidence required. Consequently it would be desirable for the body with which the complaint is lodged to be able to play an active role in the procedure, to have powers of investigation in respect of both parties, to seek the opinion of specialised bodies<sup>198</sup> and to call on expert evidence in matters of equality. Likewise, it would be desirable for witnesses of discrimination, who often are reluctant to testify for fear of reprisals, to enjoy protection. In an earlier General Survey, the Committee already had the occasion to emphasise, as regards discrimination on anti-union grounds, that the obligation of the employer to prove that there is no union-related motive underlying his or her intention to dismiss a worker or underlying the dismissal, is an additional means of ensuring real protection of the right to organise.<sup>199</sup> As stated above, the Committee also considers that the burden of proof as regards the consequences of past or present illness on a person's aptitude to perform a job should not be on this person. The above considerations show that there are circumstances in which the burden of proof of discriminatory grounds should not be on the person alleging discrimination; in any case, this person should enjoy the benefit of the doubt.

#### Protection against reprisals

226. In the Chapter concerning the scope of the Convention<sup>200</sup> the Committee stated that the effective protection of the principle of equality presupposes the existence of guarantees which provide protection against reprisals to persons who complain to the competent authorities or initiate legal action to enforce their rights.<sup>201</sup> Retaliatory measures against a person who has suffered discrimination and who has exercised a right provided for under national policies of equality of opportunity and treatment are especially serious and may have pernicious effects as regards the practical application of anti-discriminatory provisions, since the victims of discrimination often hesitate to have recourse to mechanisms of redress out of fear

<sup>197</sup> See above, Chapter II, Section 3, para. 115.

<sup>198</sup> For example, in Belgium, specialised joint committees are responsible for giving opinions to courts which request them both in the private and in the public sectors.

<sup>199</sup> General Survey of 1983 on freedom of association and collective bargaining, para. 280.

<sup>200</sup> See above, Chapter II, Section 3, para. 115.

<sup>201</sup> The Committee noted in its General Survey of 1986 on equal remuneration, para. 169, that women workers must be made aware of the existence of measures to protect them against retaliatory action: particularly in times of high unemployment, there may be an inclination to tolerate discrimination rather than risk dismissal.

of reprisals. For this reason the annulment of such provisions and the reinstatement of the person who has suffered discrimination constitute the most suitable remedy. Effective protection against discrimination in employment presupposes recognition of the principle of protection against dismissal: thus, when the legal system provides for equal treatment but allows the employer to terminate the contract of employment without having to state the reasons for such termination, repeated instances of discrimination in the private sector will not be brought before the courts, while public servants, who are better protected against dismissal, will be able to enforce their right to equal treatment.

### Remedial action

227. Discrimination causes material and moral harm; although it may be relatively easy, as regards discrimination in remuneration, to repair the damage incurred by means of an adjustment in the level of remuneration, back pay and punitive damages, as evidenced by the pertinent legislation adopted in this connection in a number of countries,<sup>202</sup> remedies for discrimination in access to training, employment or occupation, and in conditions of employment do not usually lend themselves to purely financial compensation.<sup>203</sup> In its report the Government of the United States emphasised that remedying racial discrimination poses highly complex problems. It stated that, when it can be established that certain persons have been victimised by discrimination, the courts may order that these persons be reinstated in positions they would have occupied had there been no discrimination. The courts may order a variety of measures, including the reinstatement of workers dismissed on racial grounds, the payment of back wages, allowances and promotions of which they had been deprived owing to the employers' discriminatory practices. The courts

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<sup>202</sup> In this connection see the General Survey of 1986 on equal remuneration, para. 174.

<sup>203</sup> As the Committee noted above (para. 211), when discrimination concerns vocational training Belgium provides a special expedited procedure to obtain a court injunction within eight days from the initiation of the proceedings. On the other hand, there seems to be no provision for specific remedies in cases of discrimination as regards recruitment and promotion (Revue du travail, Ministry of Labour and Employment, March-April 1986, p. 293). In the Federal Republic of Germany, following two orders issued in April 1984 by the Court of Justice of the European Communities concerning the question of indemnities in cases of discrimination in access to employment, in which the Court decided that an effective and dissuasive indemnity should be in proportion to the damages incurred, and therefore go beyond a purely token indemnity, several labour courts ordered indemnities of up to six months' wages (decisions of the CJEC of 10 April 1984, Case No. 14/83, Von Colson and Karmann v. Land Nordrhein-Westfalen and Case No. 79/83, Harz v. Deutsche Tradex).

may also order the employers to cease and desist from such practices. However, in situations where such discrimination is particularly serious or has existed for a long time, these remedies do not suffice. For this reason, the courts have sometimes ordered, or the parties have voluntarily agreed to undertake, affirmative action measures to remedy the effects of past discrimination. Generally, these measures entail programmes which favour the workers of a given minority in comparison with White workers.<sup>204</sup> In Sweden, in cases where sex discrimination in employment has been proven (contract, dismissal, etc.), the employer shall pay punitive damages, and in the case of discrimination in recruitment, damages for moral harm. In the United Kingdom, in cases where complaints of racial discrimination in employment are well-founded, the labour court may order the defendant to pay damages and interest.<sup>205</sup>

228. The victims of discrimination who take the material and moral risks of instituting judicial proceedings should benefit from suitable remedies which would moreover have a dissuasive effect upon those who would consider engaging in discriminatory practices. In a previous General Survey,<sup>206</sup> the Committee noted that as regards measures for compensating a unionised worker for prejudice suffered, the reinstatement of a worker who has been dismissed or discriminated against because of anti-trade union motives, constituted the most appropriate means of redressing acts of anti-trade union discrimination; legislation which includes protective provisions, but which allows the employer in practice to terminate the employment of a worker on the condition of paying the compensation provided for by law in all cases of unjustified dismissal, when the real motive is trade union membership or activity, is inadequate under the terms of Article 1 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). In this connection, an expeditious procedure such as that instituted in Belgium as regards discrimination in training offers obvious advantages.<sup>207</sup>

### Sanctions

229. Many countries attempt to secure observance of provisions on equality by prescribing penalties for breach of such provisions, either in special legislation or in the wider context of labour legislation

<sup>204</sup> Local 28, Sheet Metal Workers v. EEOC, 41 FEP 107 (1986).

<sup>205</sup> Act of 1976 on race relations, ss. 54 and 56.

<sup>206</sup> General Survey of 1983 on freedom of association and collective bargaining, para. 277.

<sup>207</sup> The Committee noted that in the Federal Republic of Germany, a certain number of trade unions, associations and authorities advocated not only an inversion of the burden of proof, but also that the victim of discrimination should have the right to obtain employment or promotion rather than a financial remedy, and that the authors of discriminatory offers of employment should be fined.

in general.<sup>208</sup> In some cases, such provisions have been included in the Penal Code following the adoption of legislation on equality.<sup>209</sup> They usually concern acts of discrimination in training, access to employment and conditions of work;<sup>210</sup> they may be applied to acts of discrimination committed by officials.<sup>211</sup> Penalties usually take

<sup>208</sup> Australia: Sex Discrimination Act 1984, ss. 87-90; Belgium: Act of 4 August 1978, s. 141; Brazil: Act No. 7437 of 1985: acts of discrimination based on prejudice as to race, colour, sex or marital status constitute penal offences; Dominican Republic: Labour Code, 1951, ss. 678-679; Finland: Act of 1986 respecting equality between women and men; France: Act on equality in employment between women and men, 1983 (ss. 152-1, 152-1-1, 152-1-2, 154-1, R 154-0 of the Labour Code); Ghana: Education Act, No. 87 of 1961; Greece: Act No. 1414 of 30 January 1984; Iceland: Act on the equal status and equal rights of women and men, No. 65 of 1985; India: Equal Remuneration Act 1976; Ireland: Employment Equality Act, No. 16 of 1977; Israel: Employment Service Law, s. 42; Italy: Act No. 903 of 1977 on equality; Jamaica: Employment (Equal Pay for Men and Women) Act 1975; Libyan Arab Jamahiriya: Labour Code, s. 159; Luxembourg: Act respecting equal treatment; Mexico: Federal Labour Act of 1969; Norway: Act respecting equality between the sexes; New Zealand: Race Relations Act of 1971, s. 5; in this country, the Human Rights Commission has used the concept of a continuing violation in accepting a complaint alleging discrimination flowing from a collective agreement negotiated after the adoption of the Human Rights Act; Panama: Labour Code, s. 1064; Papua New Guinea: Employment Act of 1978, s. 97; Philippines: Labour Code, ss. 133 and 278; Portugal: Legislative Decree No. 392/79 on equality; Sao Tome and Principe: Rural Code of 1962, s. 307; Spain: Act No. 8 of 1980 to promulgate a Workers' Charter, s. 57; Syrian Arab Republic: Labour Code of 1959, s. 224; Turkey: Act No. 1475 of 1971, as amended in 1983; Venezuela: Act No. 274 of 1983; Zimbabwe: Labour Relations Act 1985, s. 5(3).

<sup>209</sup> France: Penal Code, ss. 187 and 416; Netherlands: Penal Code, s. 429quater; Sweden: Penal Code, Ch. 16, s. 9, prohibits discrimination on account of race, colour, nationality and ethnic and social origin.

<sup>210</sup> Belgium: Act of 4 August 1978, s. 141; Brazil: Act No. 7437 of 1985: a person shall be liable to a term of imprisonment and a fine if he or she refuses to enrol a student in an educational establishment, irrespective of the level or nature thereof, for reasons relating to race, colour, sex or marital status; the same applies to a person who refuses a post or job in the autonomous state bodies, semi-private corporations, enterprises holding concessions from the public service or private enterprises for the same reasons.

<sup>211</sup> Brazil: Act No. 7437 of 1985 provides for dismissal of an official guilty of committing an act of discrimination in access to education or training. France: Penal Code, s. 187; USSR: Labour Code, s. 249. Officials guilty of a breach of labour legislation are criminally liable in accordance with the procedure laid down by the legislation of the USSR and that of the RSFSR.

the form of fines, which are sometimes substantial,<sup>212</sup> and in many countries may even include terms of imprisonment.<sup>213</sup> In countries

<sup>212</sup> In Spain, penalties vary in severity depending on the gravity of the offence, the bad faith or dishonesty of the employer, the number of workers concerned, the scale of the undertaking's business and whether the case involves a repetition of the offence. Penalties are imposed by the labour inspectorate or, where appropriate, by the Council of Ministers according to the proper administrative procedures; in Finland, an employer may be liable to fines for publishing discriminatory vacancy notices; in Ghana, the Education Act, No. 87 of 1961, imposes a fine on any person who refuses access to school to a pupil on account of the religion, nationality, race or language of the pupil or one of his or her parents; in Greece: an employer may be liable to a fine for breach of the Equality Act, No. 1414 of 1984; in India, under the Equal Remuneration Act 1976, an employer may be liable to a fine if, inter alia, he or she refuses to give information or discriminates on account of sex; in Ireland, Act No. 16 of 1977 prescribes fines for failure to carry out a court order relating to discrimination in employment; in Luxembourg, fines may be imposed for discriminatory offers of employment; in Portugal, persons guilty of infringing the legislation on equality are liable to a fine for each infringement, which is doubled in the event of repetition of the offence (such as publication of discriminatory vacancy notices, or the institution of job description or evaluation systems containing inequalities based on sex). In Cape Verde and Sao Tome and Principe, fines may be imposed for infringements of the Labour Code, including those of the provision prohibiting the establishment of differences in the rate of remuneration on the grounds of sex, belief, the group to which the worker traditionally belongs, or his or her occupational group or ethnic origin. Fines are also prescribed as penalties for acts of discrimination in Iceland, Israel, Italy, Papua New Guinea, Turkey (equal remuneration), and Venezuela.

<sup>213</sup> Belgium: Act of 4 August 1978, s. 141: eight days to one month's imprisonment and/or a fine of Belgian F26 to Belgian F500; Brazil: Act No. 7437 of 1985, ss. 7 and 8: three months' to one year's imprisonment and a fine; dismissal of an official who impedes a person's access to civilian or military public employment for discriminatory reasons; France: Penal Code, s. 187: two months' to two years' imprisonment and/or a fine of FF3,000 to FF30,000 may be imposed on any agent of the public authority who wittingly denies a person a right to which he or she is entitled on account of his or her origin or belonging to a certain ethnic group, nation or race. Under s. 416 of the Penal Code, two months' to one years' imprisonment and/or a fine of FF2,000 to FF10,000 may be imposed on a person who, on the same grounds, withholds a service or makes such service conditional on the same grounds or refuses to hire or dismisses a person on the same grounds or makes an offer of employment conditional upon the same grounds; Jamaica: a person shall be liable to up to 12 months' imprisonment or to a fine for breach of legislation on equality of remuneration (as well as daily fines if the breach continues after the

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where specialised agencies have been set up to implement legislation relating to equal treatment, provision has often been made for the imposition of penalties on persons who refuse to co-operate with the competent authority during investigations of complaints or who fail to comply with the regulations in force.<sup>214</sup>

230. In previous General Surveys,<sup>215</sup> the Committee referred to sanctions, in particular penal sanctions, to guarantee the application of protective provisions relating to non-discrimination for trade union membership and to equal remuneration. The Committee emphasised, *inter alia*, that sanctions should have a dual purpose, namely to punish the guilty and, above all, to act as a deterrent against discrimination. In its 1987 report,<sup>216</sup> the Committee drew attention in its 1987 general report to the importance of establishing effective sanctions and of adapting monetary penalties in order to ensure that they exert an effective preventive influence against acts contrary to the guarantees laid down by international labour Conventions.

### Subsection 5: Educational programmes

231. By providing for the promotion of "such educational programmes as may be calculated to secure the acceptance and observance" of national policy, Article 3(b) of the Convention stresses how important it is that the parties concerned should adhere

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offender has been convicted); New Zealand: a person guilty of inciting racial disharmony is liable to up to three months' imprisonment or a fine; Philippines: infringements of the Labour Code may be punished with a fine and/or imprisonment. In Zimbabwe, a person who infringes the provisions prohibiting discrimination on grounds of race, tribe, place of origin, political opinion, colour, creed or sex shall be liable to a fine or up to one year's imprisonment. In the Netherlands, the Act respecting the employment of disabled persons provides that prison terms or fines may be imposed on an employer who refuses to provide information required: such terms may amount to reach four years' imprisonment if information supplied is deliberately falsified (Act of 16 May 1986, s. 17); in this country, under s. 429<sup>quater</sup> of the Penal Code, a person is liable to penalties if he or she discriminates against a person on grounds of race in the exercise of an occupation or activity; according to the Government (report for the period ending 30 June 1986), this section is to be interpreted more widely to cover indirect discrimination as well.

<sup>214</sup> In Norway, for example, any action attempting to encroach upon the Ombud/Ombudsman's and Committee's supervisory activities is punishable with imprisonment and/or fines; in Canada, fines of up to 50,000 Canadian dollars may be imposed in the event of failure to comply with regulations approved by the Canadian Human Rights Commission.

<sup>215</sup> General Survey of 1983 on freedom of association and collective bargaining, para. 278, and General Survey of 1986 on equal remuneration, para. 178.

<sup>216</sup> RCE 1987, para. 148.

to this policy. Educational and information programmes are designed to improve awareness of the features of discrimination in order to change attitudes and behaviour patterns and bring about due respect for the right of everyone to equality of opportunity or treatment, irrespective of race, colour, sex, religion, political opinion, national extraction, social origin, etc. All countries which sent information on this issue underscored the importance they attached to action in the field of education and information. They consider it a vital complement to various measures to promote equality in employment and occupational life. However, the Committee regrets the somewhat cursory nature of many reports and the fact that too often they failed to discuss problems in depth. It also regrets that it is only able to provide a limited follow-up to the comments it made in a previous Survey on the content of information and its effects: "First of all it may appear desirable that campaigns to educate public opinion should not be based solely on moral arguments, which are generally the first to be invoked. It would be worth while laying emphasis on other considerations, such as the economic factor; when thorough studies have been made of the costs of discrimination, at both macro-economic and micro-economic levels, people will probably be easier to persuade if they also realise where their interests lie. Furthermore, it is not enough to eliminate negative attitudes but appears desirable to try, as has been done in certain countries, to encourage positive attitudes by doing more to promote the idea of equal opportunity from its theoretical and practical aspects."<sup>217</sup>

232. Educational action, carried out by methods adapted to national circumstances and practices, may take various forms. Many countries referred to the inclusion of courses on various issues such as racial discrimination in school curricula.<sup>218</sup> Few details were given on the level of this instruction, its content and the training of teachers entrusted with giving it. In several countries, bodies set up to promote, apply and supervise policy take part in school or university activities by holding conferences from time to time or, on a more regular basis, by participating in the drawing up of programmes and courses or even in the training of instructors. In Canada, the Human Rights Commission has developed a module on employment equity to outline the roles of various organisations in implementing equality in the workplace. Various provinces have taken similar steps in education.<sup>219</sup>

<sup>217</sup> General Survey, 1971, para. 80.

<sup>218</sup> See for example, Cape Verde, Cyprus, India, Nepal, courses on basic human rights have been incorporated into the curricula of the final years in secondary schools; Niger, Rwanda, Sudan, United Republic of Tanzania, Trinidad and Tobago, CERD/C/116/Add.3, p. 5: "schools are also encouraged to set aside periods for teachers to discuss our efforts to combat racism and racial discrimination"; Ukrainian SSR, CERD/C/118/Ad.8, p. 22.

<sup>219</sup> Alberta: university courses prepared in co-operation with the Canadian Human Rights Commission to explain federal and provincial human rights legislation and help employers develop effective  
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233. In several countries, research programmes are being carried out on matters affecting progress towards equality of opportunity which advise the parties concerned (employers, trade unionists, education authorities and others) on how to work towards equality. In Belgium, the Government mentioned that some of these research projects are carried out in the universities.<sup>220</sup> In the Caribbean, the project "Women in the Caribbean" is a vast research programme undertaken by the Institute of Economic and Social Research of the University of the West Indies (Barbados, Jamaica and Trinidad and Tobago). This programme is intended to extend empirical knowledge and give a better grasp of the daily life of women in the Caribbean as well as to contribute towards identifying policies and programmes that might deal with and alleviate several problems encountered by women.<sup>221</sup> As a result of this project, recommendations drawn up for governments and non-governmental organisations on legislation, education, family policy, employment and agricultural policy have been submitted to the parties concerned. In its report, the Government of the United Kingdom points that that the Equal Opportunities Commission may award grants to voluntary organisations and individuals to carry out research projects on matters dealing with equality.

234. The general public may also be informed through the mass media, by means of regular broadcasts or special programmes,<sup>222</sup> or even by the distribution of posters.<sup>223</sup> In Australia the Committees set up to combat discrimination launched in 1983-84 an equal employment opportunity campaign to inform further groups experiencing discrimination about the Committees' role and to promote equal employment opportunity personnel practices amongst employers, employees and trade unions.<sup>224</sup> Furthermore, the Government of one of the states in the same country pointed out that the issue of public education was highlighted during the deliberations on the Equal Opportunity Bill; of the six major functions of the Commissioner

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employment practices which adhere to the legislation; British Columbia: inclusion of a course on the principles of human rights and discrimination in the social studies curriculum; the introduction of a course on the same subject in elementary schools is planned for September 1988.

<sup>220</sup> Research project on "la signification pédagogique des figures de référence proposées aux garçons et aux filles dans l'enseignement post-secondaire" [the educational significance of role models for young men and women in post-secondary instruction] which deals with the determination of the traditional roles of young men and women.

<sup>221</sup> See J. Massiah, (ed.), "Women in the Caribbean", Social and Economic Studies, Vol. 35, Nos. 2-3, University of West Indies, 1986.

<sup>222</sup> Angola; Cuba; Guinea-Bissau; Iraq; Indonesia; Mali; Nepal; Nicaragua; Qatar; Seychelles.

<sup>223</sup> See for example, Belgium, RCE 1983, p. 206 (distribution of posters intended to encourage women to choose occupations that are not traditionally feminine).

<sup>224</sup> RCE 1985, p. 279.

outlined in the Bill, four specifically relate to disseminating information, consulting with various groups and developing programmes and policies designed to eliminate discriminatory attitudes in the community.<sup>225</sup> A community education officer in the Office of the Commissioner carries out various activities including: development of a community education strategy and programme; publication of a newsletter; development of an extensive mailing list for publications; media liaison for the Commissioner and speech writing and public speaking. The Government of India points out that as the press in this country enjoys total freedom of opinion and expression, it is able to contribute in a positive way towards promoting understanding, tolerance and friendship between the various racial groups. Guide-lines have been drawn up by the Ministry of Information and Broadcasting on the role of state media in the dissemination of information to combat racial prejudice. According to these guide-lines: "(i) vigorous steps should be taken by the official units to serve the rural population, minority communities, women, children, illiterate as well as other weaker and vulnerable sections of the society; (ii) each media unit should try to encourage both individual and collective efforts by the handicapped [...] as well as institutions serving this section of society [...]; (iii) the media units should devise suitable programmes to eradicate social evils such as untouchability, narrow parochial attitudes and loyalties and inequalities and exploitation". As a result of these guide-lines drawn up by the Government, the various services under the Ministry of Information and Broadcasting has produced or broadcast a considerable number of programmes during the past few years.<sup>226</sup> In Iceland, a project is being undertaken in co-operation with the Nordic Council aimed at developing and testing methods for breaking down the male-female division of the labour market. Great emphasis has been laid on providing publicity for the project in order to promote debate on the position of women in the labour market. This publicity, designed to bring about a change of attitude towards greater equality between the sexes, is directed both at the general public through the media and at particular groups such as students, teachers, parents, employers and employees. In the Netherlands, an information campaign making use of a new folder, press advertisements, television spots and leaflets on equal treatment of men and women has resulted in a conspicuous increase in the number of applications for advice submitted to the Committee on Equal Treatment for Men and Women at Work.<sup>227</sup> In Sweden, activities of the Equal Opportunities Ombud/Ombudsman have included the production of a video cassette dealing with the requirements of the Equal Opportunities Act for active promotion of equality between the sexes. This video cassette

<sup>225</sup> Western Australia; see also Northern Territory: officers of the Office of Equal Opportunity meet with and address groups, associations and organisations for the purpose of creating a climate of opinion favourable for the observance of the principles of non-discrimination and equality of opportunity in employment.

<sup>226</sup> CERD/C/149/Add.11, p. 16.

<sup>227</sup> RCE 1983, p. 222.

has mainly been addressed to employers and was re-transmitted in a television programme. The Government of Tunisia has pointed out that national women's and vocational organisations participate in the process of informing and educating the public with regard to the national policy against discrimination.<sup>228</sup>

235. Much information was provided on publication programmes. Some publications are aimed at a very wide public,<sup>229</sup> others are more specialised and deal with certain aspects on the ways to combat discrimination.<sup>230</sup> They are often of a practical nature. In Venezuela, the Ministry for the Participation of Women in Development has published a practical guide; alongside various basic information on women's legal and social status, it contains a digest of legislation and regulations on women's rights in various fields (work, civil status, taxation, pensions, social security, legal assistance), information on mother-and-child welfare, health protection, consumer protection, social protection and ways to apply these rights. This practical information is supplemented by a list of addresses.<sup>231</sup> Several bodies entrusted with promoting, applying and supervising equality of opportunity have a programme of publications which includes reprints of documents, guides, bulletins, activity reports, and summary reports of seminars, research work<sup>232</sup> or basic statistical data.<sup>233</sup> Most of these publications are sent free of charge to those who make the request or to the organisations concerned. In Sweden, the information journal "Jämsides" ("Side-by-side") has a circulation of 17,000 (for a working population of 4,385,000) and is mainly distributed to union officials, employers'

<sup>228</sup> RCE 1987, p. 376.

<sup>229</sup> See for example the bulletins and periodicals published by specialised bodies in the following countries: Australia, Canada, New Zealand, Sweden, United States, etc.

<sup>230</sup> Austria, in its report, the Government mentioned three types of publications; those concerning the social status of women, research on social and employment market policies and those dealing with equality of opportunity; France, the Ministry of Women's Rights and the Ministry of Labour, Employment and Vocational Training have jointly published a brochure for the general public on the application of the Act of 13 July 1983, entitled "L'égalité professionnelle", designed to help the Act to be implemented in practice; Federal Republic of Germany, following a survey carried out in co-operation with various branches of private industry, a manual giving precise indications on how to develop and bring out promotional measures for women at work has been published.

<sup>231</sup> Ministry for the Participation of Women in Development, Guía de la mujer, Caracas, 1981.

<sup>232</sup> Belgium: pamphlets from the Women's Labour Committee; Portugal: opinions published by the Committee for Equality of Treatment in Employment to make the social partners and public opinion more aware of attempts to combat discrimination.

<sup>233</sup> Canada: a regular statistical bulletin, Women in the Labour Force, compiles data on women's participation in the labour force, earnings, benefits and rate of unionisation.

representatives, and equal opportunities and personnel officers at various workplaces. Although little information was sent on the criteria applied for distributing these various publications, the Committee feels that a certain selection has been made to determine those persons most likely to be interested by them; those who might, through their work, pass the information on to a wider public (teachers, journalists, etc.). At the present juncture, when programmes without a purely economic aim are often being suppressed on austerity grounds, these publication programmes should be better defined in relation to the audience addressed. In some countries, texts to facilitate the application of legislation on equality of opportunity and treatment within the enterprise are published by specialised bodies or by governmental services and distributed to both employers and workers. In Ireland, the Ministry of Labour publishes a series of brochures on employment equality which gives a broad outline of the legislation in force; these are intended for heads of enterprises, especially those of small and medium-sized enterprises, heads of personnel, trade unionists, workers or "simply interested citizens".<sup>234</sup> In New Zealand, the New Zealand Employers' Federation published a positive action manual in 1985 for its members. Another manual entitled "Employing people with disabilities" has recently been published by the Federation, with the Government's approval. In the same country, practical pamphlets on specific aspects of discrimination in employment, such as sexual harassment, which are drawn up either for the complainants or supervisors, are published by the Equal Employment Opportunities Unit of the State Services Commission.

236. Some governments pointed out that the role of trade unions within the enterprise was not only to defend workers' interests, but also to inform them and make them more aware of matters pertaining to equality of opportunity and non-discrimination at work.<sup>235</sup> However, there was little information as to the way in which the trade unions within the enterprise actually fulfilled this responsibility. In Argentina, the Commission for the Family and Minorities of the Senate of the Nation organised a seminar on equality of opportunity in employment for women members of the trade unions.<sup>236</sup> In Burkina Faso, executive staff from the Ministry of Labour give lectures intended to make workers more aware of the strict respect of principles of non-discrimination during seminars organised by employers' and workers' organisations. In Canada, seminars were organised by the Federal Department of Labour for employers' and workers' organisations (Women's Bureau, Seminar on Equal Pay for Work of Equal Value, February 1986), for union representatives as part of

<sup>234</sup> Ministry of Labour, Guide to Labour Law, Dublin 1987; see also Ministry of Labour, Unfair Dismissal, Employment Equality, Payment of Wages, Dublin 1987 and Youth Employment Agency, 50/50 is not Equality, Dublin 1987.

<sup>235</sup> Algeria; Angola; Indonesia; Malaysia; Nicaragua.

<sup>236</sup> Honorable Senado de la Nación, Seminario para mujeres sindicalistas por la igualdad de oportunidades en el trabajo, Buenos Aires, 1986.

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Labour Canada's Education Programme (Equal pay: Collective Bargaining and the Law, February 1987); others were organised by the Federal Canadian Human Rights Commission (Seminar on new Equal Wages Guide-Lines, February 1987) which brought together employers, workers, members of groups concerned and universities. In Cyprus, workshops and seminars are organised by the Government, women's organisations and trade union organisations, during which issues falling within the scope of the Convention are discussed. In India, the Central Board for Worker's Education and the National Labour Institute organise training programmes to make workers more aware of their rights, especially as regards the Equal Remuneration Act, 1976. The Government also points out that the voluntary organisations of scheduled tribes and castes also play a vital role by informing their members of their constitutional rights. The Government of Suriname mentioned that workers' education, which is dispensed by the Suriname Labour College and sponsored by the social partners, also contributes towards the education of those concerned. Several governments stressed the importance they attached to training officials entrusted with applying the principle of equality.<sup>237</sup> In New Zealand, seminars are organised for officials belonging to ethnic minorities (Samoans, evidence from Pacific islanders); following one of these seminars, the report of the State Services Commission provided government departments with guidance on issues affecting the employment conditions of members of ethnic minorities.

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<sup>237</sup> Canada: the Government reported that the Canadian Human Rights Commission had organised workshops for managers explaining the principles of employment equity and the requirements for its implementation in conjunction with major employers in the federal sector and the Canada Employment and Immigration Commission; India: the Government pointed out that officials undergo a training programme on the application of the principles of non-discrimination; Indonesia.





## CONCLUSIONS

### Basic importance of the Convention

237. It would be difficult to overestimate the importance of the Convention which is the subject of this Report. Thirty years after its adoption by the Conference in 1958, Convention No. 111 is one of the five ILO instruments that have received the highest number of ratifications. Since the previous General Survey in 1971, 34 countries with various economic, political and social systems, in all the regions of the world,<sup>1</sup> have ratified the Convention, bringing the total number of ratifications to 108. This high number of ratifications is a clear reflection of the general level of acceptance of the principle of equality of opportunity and treatment in employment and occupation. Unfortunately, nearly one-third of the member States of the ILO have not yet ratified the Convention. An important decision of the Governing Body<sup>2</sup> invited the governments of countries that have not yet ratified Convention No. 111, starting in 1980 and at regular four-year intervals, to submit reports under article 19 of the Constitution specifically regarding the difficulties in ratification, the measures envisaged to overcome these difficulties, and the prospects for ratification. This regular examination of the situation in countries that have not ratified the Convention should contribute to promoting its ratification. Indeed since this procedure was introduced, 11 ratifications have been registered.

238. The underlying principles of the Convention are universal, but it was essential to ensure that the Convention itself was flexible enough to be applied in countries with a great diversity of economic and social conditions. When the Convention was adopted, emphasis was placed on defining the objectives to be achieved by declaring and pursuing a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation. The actual measures employed could be varied according to national conditions and practice, but the national policy should be based on the principles set forth in the Convention: it should cover all the grounds of discrimination referred to by the Convention (Chapter I, Section 3),

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<sup>1</sup> Africa: Angola, Cape Verde, Guinea-Bissau, Mozambique, Rwanda, Sao Tome and Principe, Swaziland, Togo, Zambia. Americas: Antigua and Barbuda, Barbados, Bolivia, Chile, Dominica, Guyana, Haiti, Jamaica, Saint Lucia, Venezuela. Asia: Bangladesh, Nepal. Europe: Austria, Belgium, France, German Democratic Republic, Greece, Netherlands, Romania, San Marino. Middle East: Lebanon, Qatar, Saudi Arabia. Oceania: Australia, New Zealand.

<sup>2</sup> See above, Introduction, para. 1.

promote equality of opportunity in employment and occupation with a view to eliminating all types of discrimination in law and in practice (Chapter IV) and achieve the principle of equality in all fields of occupation and employment (Chapter II).

#### The indivisibility of equality

239. Equality in employment cannot be fully achieved within a general context of inequality. Inequality in social status inevitably results in inequality of treatment and above all in inequality of opportunity in employment. The most salient example is that of apartheid, which is described as a crime against humanity by the International Convention on the Suppression and Punishment of the Crime of Apartheid. The policy of separate development presupposes that different racial groups are incapable of developing in the same manner and at the same pace, which is the contrary of what has been proved for the rest of humanity, and leads to an individual's opportunities being restricted, because his or her position in society is determined by race. Policies that lead to separate development on the basis of personal characteristics other than race and colour, and that are also covered by Article 2 of the Universal Declaration of Human Rights, result in discrimination which directly affects employment and occupation, or which has repercussions for them. The repudiation of any policy that introduces unequal status on the basis of distinctions or preferences between groups of the population or individuals, based only on their belonging to a group, is a fundamental objective under the Declaration of Philadelphia, enabling the programmes of action and measures taken nationally and internationally to be understood and accepted.

#### The need for continuous action

240. With regard to the implementation of the measures provided for in the Convention and Recommendation, the Committee emphasises once again the importance that it attaches to vigilance to ensure continuing action is taken in those areas where the national policy on equality of opportunity and treatment in employment or occupation is to be pursued. It is apparent that there will always be room for improvement. For that reason it is difficult to accept statements to the effect that the application of the Convention gives rise to no difficulties or that the instrument is fully applied, especially when no other details are given on the contents and methods of implementing the national policy. The promotion of equality of opportunity and treatment does not aim at a stable situation that may be attained once and for all, but rather requires a permanent process so that policy may be adjusted to changes in society in order to eliminate the various forms of distinctions, exclusions and preferences based on grounds laid down in the 1958 instruments. The absence of a policy of this nature, far from signifying a lack of discrimination, would tend to imply the existence of discrimination. The observation made by the Committee in its General Survey of 1986 on equal remuneration applies

equally to the present instruments: once rigorous action gets under way and new measures are adopted to implement the principle of equality of opportunity and treatment, the existence of problems will in practice be brought to the surface, thus requiring further progress.

241. The application of the principle set forth in the Convention therefore is best achieved in successive stages, each stage giving rise to the discovery of new problems leading to the adoption of new remedies. Furthermore, it appears that many of the difficulties encountered in implementing the principle of equality of opportunity and treatment are intimately bound up with the status of men and women in employment and society generally. The right to equal access to training, employment and occupation cannot be attained in a general context of inequality. The solutions that are to be applied to matters of equality in employment and occupation form part of a more wide-ranging series of measures for the progressive building of a discrimination-free society. To this end the Committee points out that the authorities responsible for combating discrimination in respect of employment and occupation should work in close co-operation with the authorities responsible for combating discrimination in other fields, in order to co-ordinate all the measures taken.

### Stages in the implementation of the Convention

242. The inclusion of the principle of equal opportunity and treatment in national legislation is an important stage in its implementation. The Committee has noted, with regard to discrimination on the basis of religion,<sup>3</sup> that the abundance of provisions in constitutions, laws and collective agreements should not obscure the difficulties that can arise from their application. These provisions need to have a practical impact in order to promote real equality of opportunity and treatment in respect of employment and occupation. However, the scope and influence of these overall measures is not insignificant. Constitutional guarantees can establish rights enforceable in the courts by those concerned. They can also determine the general guide-lines that establish the scope of the national policy and influence attitudes by setting out rules for social behaviour. But it is important, if this has not already been done, that the guarantees should be applied through provisions which are enforceable and through practical measures.

243. Supplementary measures may be necessary too to give practical application to laws laying down general principles. Subordinate laws and especially collective agreements often prescribe the conditions in which equality of opportunity and treatment may be furthered. Access to appeal and the existence of an institutional framework designed to guarantee equality of opportunity and treatment have great practical importance. The interdependence of standards and

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<sup>3</sup> See above, Chapter I, Section 3, para. 49. The observation made by the Special Rapporteur of the United Nations also applies to all other grounds of discrimination.

practical provisions in this field should be borne in mind. These two methods of action, the relative importance of which depends on national customs and conditions, reinforce each other and are therefore inseparable, as illustrated by most of the information available on the application of the 1958 instruments. Action is, however, often still needed in order to cover all the grounds of discrimination set forth in Article 1, paragraph 1(a), of the Convention. In particular, in cases where national practice requires the adoption of constitutional or legislative provisions in order to give statutory effect to equality of opportunity and treatment, all the grounds set forth in the Convention should be explicitly included in these provisions.

Requirement to eliminate discrimination from law  
and administrative practice

244. The Convention and Recommendation provide for the primary obligation to eliminate any discriminatory measure in respect of employment and occupation from law and administrative practice. A number of the situations referred to in this General Survey demonstrate that this obligation is not yet fully observed in all countries, although the Committee has been able to note with satisfaction that in many cases progress has been achieved since the last General Survey. In certain countries, and particularly under the impetus of specialised bodies set up to supervise the application of the policy of equality, the legislative provisions and regulations in force have been examined or are being examined, so that amendments can be submitted to the competent bodies in order to eliminate discriminatory clauses.

245. The same applies to administrative practices which often interpret general provisions and therefore take on considerable importance in the everyday application of the principle of equality. In the public sector assessments of administrative methods which take due account of equality of opportunity and treatment have resulted in some countries in the adoption of directives that are free from discrimination. It would be desirable for such assessments to be made, taking into account the equality dimension, for practices respecting access to employment, occupation, training and conditions of employment, for example in programmes to streamline the public service. Representation of all the groups in a society plainly contributes to increasing the effectiveness of public services. The application of policies of equality of opportunity and treatment in jobs under the direct control of a national authority is particularly important.

246. The Committee points out in particular the effect that the full application of the national policy of equality of opportunity and treatment in jobs under the control of a national authority can have as a model for other sectors of activity and in establishing the general context of equality referred to above. It is against this yardstick that the resolve to implement the national policy of equality, which all States having ratified the Convention must declare and pursue under its Article 2, can be measured. The Committee wishes

to draw attention to the importance of the strict observance of this obligation. The concern expressed by several countries to reduce certain expenditures, particularly public expenditures, should not call into question programmes for providing equal access to jobs under the control of a national authority.

### Danger of persisting de facto discrimination

247. In general, the most widespread kinds of inequality in respect of employment and occupation do not necessarily stem from legislation, but from de facto situations and relations between individuals. Occupational segregation based on sex or race is very widespread. Since this is less easy to identify than deliberate acts of discrimination, it is only clearly revealed by statistical analyses of the distribution of labour in the national economy, branch of activity or enterprise. The tools employed to demonstrate these divisions in the labour market need to describe this situation as exactly as possible and policies may be required to re-establish the equilibrium between the sexes and between the various groups in the population. The Fourteenth International Conference of Labour Statisticians (Geneva, 28 October-6 November 1987) attached considerable importance to the adoption of an international standard classification which takes correct account of the role of women's labour. One of the principal advantages of this is that it would enable the increasing number and variety of occupations exercised by women to be monitored. It would be desirable for national classifications relating to national circumstances and customs to specify in detail the particular areas of occupational groups in which women and members of underprivileged groups predominate. By doing so, it might be possible to avoid the risk of undervaluing the special skills, training and experience required in so-called "women's" occupations and occupations in which members of underprivileged groups are employed. Improvement in the means available for compiling information on direct and indirect forms of discrimination based for example on race, colour or sex is indispensable if progress is to be made in the elimination of discrimination and the promotion of equality of opportunity and treatment.

248. The subject is a delicate one, since this type of information could serve as a basis for other forms of discrimination, particularly those relating to personal characteristics that are not immediately apparent, such as religion, political opinion and social origin. One of the means of preventing discrimination based on personal characteristics that do not form part of the inherent requirements of a particular job may be to restrict the information that may be requested and kept by the enterprise or administrative department to what is relevant to the requirements of the job, in line with the practice in some countries. Another method might be to give the persons concerned control over the content of their personnel files so that information that might give rise to discrimination could be removed. Whatever solution is adopted, it is difficult but important to reconcile the need for detailed information, so that the best methods of remedying discrimination can be determined, with the

need to protect individuals against discrimination based on the grounds set forth in the Convention.

Role of employers' and workers' organisations:  
National laws and collective bargaining

249. The Committee has noted that there is little information available as to the role played by employers' and workers' organisations in the application of the principle set forth in the Convention. The extent of the problem of equality of opportunity and treatment has led many governments to set up specialised bodies in which employers and workers are not always represented. In the years to come, one of the problems to be solved will be that of reconciling and harmonising two systems of standards that are still far apart: first, labour legislation and the standards arrived at through collective bargaining between employers and workers; and second, general anti-discrimination laws applied by specialised bodies and the courts. In a number of countries, emphasis is laid on collective action to eliminate discrimination and promote equality of opportunity and treatment in employment. The right to equality has to be integrated into labour legislation so that the objective can be pursued within the framework of the existing industrial relations system.

250. The objective of equality must also be pursued through the well-tried, homogeneous framework in which matters regarding equality are the subject of negotiations alongside other matters relating to working conditions. A large proportion of what are considered to be affirmative action programmes, arrived at after proof of systemic discrimination has been established, have been the subject of negotiation in these kinds of systems. The right to equality is often defined only in terms of one of the grounds of discrimination set forth in the Convention. In other countries, the methods of applying the general anti-discrimination laws (which body is competent, how the complaints machinery works, what the standards of proof are, and what the remedies are) fall outside the working environment and often involve no participation by the social partners. These laws in general cover several grounds of discrimination and extend far beyond the field of labour, covering not only occupation, education and training, but also discrimination in housing or in the provision of services which are not covered directly by the Convention. Under such systems remedial measures may be taken to rectify cases of past discrimination by granting a defined temporary advantage to members of the groups discriminated against. Many countries fall somewhere between these two models and have adopted measures of both kinds. The task of employers' and workers' organisations regarding the promotion of equality of opportunity and treatment depends on the system, although in both kinds they contribute invaluable practical knowledge of working conditions whether as direct actors or as partners. Co-operation with employers' and workers' organisations must be pursued and intensified through such measures as providing machinery for involving specialised bodies in implementing the principle of equality in enterprises. Similarly, what often seems a marginal role

given to the labour inspection services in this field should be reconsidered in the light of international labour Conventions on that subject.

### Difficulties to be overcome

251. Where there is no active employment policy that secures full and freely chosen employment, equality of opportunity and treatment is a hollow expression. The persistence of high unemployment rates and the tendency for longer periods of time to be needed to find employment strengthen old inequalities and create new ones. The exclusion from society which results particularly from a long period of unemployment and its consequences (for the individual, loss of occupational skills and loss of contact with the working environment, for the country as a whole, deterioration of the social fabric) is a powerful factor in discrimination and especially affects persons who may be subject to discrimination on grounds such as social origin, sex, age or belonging to an ethnic minority. Several countries have adopted measures in order to resolve issues of exclusion from society which go beyond the scope of the Convention and thus respond to the need for a general policy of equality. The Committee, however, notes with concern the tendency in some countries to abandon or drastically reduce programmes intended to remedy inequalities in order to decrease public expenditure in the name of economic efficiency.

252. These programmes must be viewed in a broader perspective, since the exclusion of part of the active population is costly. The difficulty in perceiving the cost involved in discrimination doubtless lies in the fact that the savings made through cutting down on affirmative measures are immediately apparent, while the costs involved in the consequences of discrimination are more diffuse and spread over a long period, and affect many sectors. Clearly the policy of equality should be declared and applied in a broad overall framework and its economic consequences should be examined. While considerations of an economic nature must not lead to the adoption of a discriminatory policy, which would be contrary to principles of dignity and freedom, care should be taken not to lose sight of the economic aspects of a policy of equality of opportunity and non-discriminatory treatment, one of whose effects would be to enable the entire active population to have access to employment or an occupation.

253. The elimination of discrimination between ethnic groups in employment and occupation is of fundamental importance, all the more so because of the re-emergence of signs of intolerance and racism in some countries. Emphasis must be laid in the first place on protection against actions which are openly discriminatory (generally through legislative provisions prohibiting discriminatory behaviour and action); it must then move towards practical and economic measures necessary to tackle the problems encountered by certain groups. Emphasis must be placed on economic integration of the members of these groups in employment and occupation so as to enable them to occupy a position in society that is free from discrimination. The Committee considers that nothing short of bold

and systematic measures, which imply making effective efforts to rally public opinion, must be given high priority in national policies on equal opportunity and treatment. In this field, failure to act will only result in a worsening of indirect discrimination and its consequences, with the woes that it entails.



## APPENDIX I

### TEXT OF THE SUBSTANTIVE PROVISIONS OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION (No. 111) AND RECOMMENDATION (No. 111), 1958

#### Convention No. 111

##### Article 1

1. For the purpose of this Convention the term "discrimination" includes -

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

##### Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

##### Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice -

- (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (d) to pursue the policy in respect of employment under the direct control of a national authority;
- (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Article 6

Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation.

.....

Recommendation No. 111

I. DEFINITIONS

1. (1) For the purpose of this Recommendation the term "discrimination" includes -

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national

extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.

(3) For the purpose of this Recommendation the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

## II. FORMULATION AND APPLICATION OF POLICY

2. Each Member should formulate a national policy for the prevention of discrimination in employment and occupation. This policy should be applied by means of legislative measures, collective agreements between representative employers' and workers' organisations or in any other manner consistent with national conditions and practice, and should have regard to the following principles:

- (a) the promotion of equality of opportunity and treatment in employment and occupation is a matter of public concern;
- (b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of -
  - (i) access to vocational guidance and placement services;
  - (ii) access to training and employment of their own choice on the basis of individual suitability for such training or employment;
  - (iii) advancement in accordance with their individual character, experience, ability and diligence;
  - (iv) security of tenure of employment;
  - (v) remuneration of work of equal value;
  - (vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment;
- (c) government agencies should apply non-discriminatory employment policies in all their activities;
- (d) employers should not practise or countenance discrimination in engaging or training any person for employment, in advancing or retaining such person in employment, or in fixing terms and conditions of employment; nor should any person or organisation obstruct or interfere, either directly or indirectly, with employers in pursuing this principle;
- (e) in collective negotiations and industrial relations the parties should respect the principle of equality of opportunity and

treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment;

- (f) employers' and workers' organisations should not practise or countenance discrimination in respect of admission, retention of membership or participation in their affairs.

3. Each Member should -

- (a) ensure application of the principles of non-discrimination -
  - (i) in respect of employment under the direct control of a national authority;
  - (ii) in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- (b) promote their observance, where practicable and necessary, in respect of other employment and other vocational guidance, vocational training and placement services by such methods as -
  - (i) encouraging state, provincial or local government departments or agencies and industries and undertakings operated under public ownership or control to ensure the application of the principles;
  - (ii) making eligibility for contracts involving the expenditure of public funds dependent on observance of the principles;
  - (iii) making eligibility for grants to training establishments and for a licence to operate a private employment agency or a private vocational guidance office dependent on observance of the principles.

4. Appropriate agencies, to be assisted where practicable by advisory committees composed of representatives of employers' and workers' organisations, where such exist, and of other interested bodies, should be established for the purpose of promoting application of the policy in all fields of public and private employment, and in particular -

- (a) to take all practicable measures to foster public understanding and acceptance of the principles of non-discrimination;
- (b) to receive, examine and investigate complaints that the policy is not being observed and, if necessary by conciliation, to secure the correction of any practices regarded as in conflict with the policy; and
- (c) to consider further any complaints which cannot be effectively settled by conciliation and to render opinions or issue decisions concerning the manner in which discriminatory practices revealed should be corrected.

5. Each Member should repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.

6. Application of the policy should not adversely affect special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status are generally recognised to require special protection or assistance.

7. Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State should not be deemed to be discrimination, provided that the individual concerned has the right to appeal to a competent body established in accordance with national practice.

8. With respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of the Migration for Employment Convention (Revised), 1949, relating to equality of treatment and the provisions of the Migration for Employment Recommendation (Revised), 1949, relating to the lifting of restrictions on access to employment.

9. There should be continuing co-operation between the competent authorities, representatives of employers and workers and appropriate bodies to consider what further positive measures may be necessary in the light of national conditions to put the principles of non-discrimination into effect.

### III. CO-ORDINATION OF MEASURES FOR THE PREVENTION OF DISCRIMINATION IN ALL FIELDS

10. The authorities responsible for action against discrimination in employment and occupation should co-operate closely and continuously with the authorities responsible for action against discrimination in other fields in order that measures taken in all fields may be co-ordinated.

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## APPENDIX II

REPORTS RECEIVED ON CONVENTION No. 111  
AND RECOMMENDATION No. 111

Member States	Convention No. 111		Recommendation No. 111
	Date of ratification	Art. 19	Art. 19
Afghanistan	01.10.69		X
Algeria	12.06.69		X
Angola	04.06.76		X
Antigua and Barbuda	02.02.83		X
Argentina	18.06.68		X
Australia	15.06.73		X
Austria	10.01.73		X
Bahamas		X	X
Bahrain		X	X
Bangladesh	22.06.72		X
Barbados	14.10.74		X
Belgium	22.03.77		X
Belize		X	X
Benin	22.05.61		-
Bolivia	31.01.77		X
Brazil	26.11.65		X
Botswana		X	X
Bulgaria	22.07.60		X
Burkina Faso	16.04.62		X
Burma		X	X
Burundi		X	X
Byelorussian SSR	04.08.61		X
Cameroon		X	X
Canada	26.11.64		X
Cape Verde	03.04.79		-
Central African Republic	09.06.64		-
Chad	29.03.66		X
Chile	20.09.71		X
China		X	X
Colombia	04.03.69		X
Comoros		-	X
Congo		-	-
Costa Rica	01.03.62		X
Côte d'Ivoire	05.05.61		X
Cuba	26.08.65		X
Cyprus	02.02.68		X
Czechoslovakia	21.01.64		X
Democratic Yemen		-	-
Denmark	22.06.60		X

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Member States	Convention No. 111		Recommendation No. 111	
	Date of ratification	Art. 19	Art. 19	
Djibouti		-	-	
Dominica	28.02.83		-	
Dominican Republic	13.07.64		-	
Ecuador	10.07.62		X	
Egypt	10.05.60		X	
El Salvador		-	-	
Equatorial Guinea		X	X	
Ethiopia	11.06.66		X	
Fiji		-	-	
Finland	23.04.70		X	
France	28.05.81		X	
Gabon	29.05.61		-	
German Democratic Republic	07.05.75		X	
Germany, Federal Republic of	15.06.61		X	
Ghana	04.04.61		-	
Greece	07.05.84		X	
Grenada		-	-	
Guatemala	11.10.60		X	
Guinea	01.09.60		X	
Guinea-Bissau	21.02.77		X	
Guyana	13.06.75		-	
Haiti	09.11.76		-	
Honduras	20.06.60		X	
Hungary	20.06.61		X	
Iceland	29.07.63		X	
India	03.06.60		X	
Indonesia		X	X	
Iran, Islamic Republic of	30.06.64		-	
Iraq	15.06.59		X	
Ireland		X	X	
Israel	12.01.59		X	
Italy	12.08.63		-	
Jamaica	10.01.75		-	
Japan		X	X	
Jordan	04.07.63		-	
Democratic Kampuchea		-	-	
Kenya		X	X	
Kuwait	01.12.66		X	
Lao People's Democratic Republic		-	-	
Lesotho		-	-	
Lebanon	01.06.77		-	

REPORT OF THE COMMITTEE OF EXPERTS

Member States	Convention No. 111		Recommendation No. 111	
	Date of ratification	Art. 19	Art. 19	
Liberia	22.07.59		-	
Libyan Arab Jamahiriya	13.06.61		-	
Luxembourg		X	X	
Madagascar	11.08.61		X	
Malawi	22.03.65		-	
Malaysia		X	X	
Mali	02.03.64		X	
Malta	01.07.68		-	
Mauritania	08.11.63		-	
Mauritius		X	X	
Mexico	11.09.61		X	
Mongolia	03.06.69		X	
Morocco	27.03.63		X	
Mozambique	06.06.77		X	
Nepal	19.09.74		X	
Netherlands	15.03.73		X	
New Zealand	03.06.83		X	
Nicaragua	31.10.67		X	
Niger	23.03.62		X	
Nigeria		X	X	
Norway	24.09.59		X	
Pakistan	24.01.61		X	
Panama	16.05.66		X	
Papua New Guinea		-	-	
Paraguay	10.07.67		-	
Peru	10.08.70		X	
Philippines	17.11.60		-	
Poland	30.05.61		X	
Portugal	19.11.59		X	
Qatar	18.08.76		X	
Romania	06.06.73		X	
Rwanda	02.02.81		X	
Saint Lucia	18.08.83		-	
San Marino	19.12.86		X	
Sao Tome and Principe	01.06.82		-	
Saudi Arabia	15.06.78		X	
Senegal	13.11.67		X	
Seychelles		X	X	
Sierra Leone	14.10.66		X	
Singapore		X	X	
Solomon Islands		X	X	
Somalia	08.12.61		X	
Spain	06.11.67		X	
Sri Lanka		X	X	
Sudan	22.10.70		X	



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Member States	Convention No. 111		Recommendation No. 111	
	Date of ratification	Art. 19	Art. 19	
Suriname		X	X	
Swaziland	05.06.81		X	
Sweden	20.06.62		X	
Switzerland	13.07.61		X	
Syrian Arab Republic	10.05.60		X	
Tanzania, United Republic of		-	-	
Thailand		X	X	
Togo	08.11.83		X	
Trinidad and Tobago	26.11.70		-	
Tunisia	14.09.59		X	
Turkey	19.07.67		X	
Uganda		-	-	
Ukrainian SSR	04.08.61		X	
United Arab Emirates		X	X	
United Kingdom		X	X	
United States		X	X	
Uruguay		X	X	
USSR	04.05.61		X	
Venezuela	03.06.71		X	
Yemen	22.08.69		-	
Yugoslavia	02.02.61		X	
Zaire		X	-	
Zambia	23.10.79		X	
Zimbabwe		-	X	

**Note:** The Convention is also applicable without modification to the following non-metropolitan territories: France (Guadeloupe, French Guiana, Martinique, Réunion, St. Pierre and Miquelon, French Polynesia, New Caledonia), New Zealand (Tokelau).

In addition, a total of 17 reports have been received, under article 19 of the Constitution, in respect of the following non-metropolitan territories: United Kingdom (Bermuda, British Virgin Islands, Falkland Islands (Malvinas), Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey and Montserrat.

X = Report received  
- = Report not received









